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No. _____

IN THE
Supreme Court of the United States

BRANDON LEON BASHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the jury foreperson's conduct during the penalty phase of a capital trial – which included calling three local television stations and two newspapers, seeking more publicity about the case, expressing "concern" and "fear" that her fellow jurors would not impose the death penalty, and requesting an on-camera interview after the verdict was returned – was a structural error that requires a new sentencing hearing without an independent showing of prejudice.

2. Whether the prosecution properly was required, but failed, to overcome a presumption of prejudice when the jury foreperson had lengthy phone conversations during trial with news organizations about the case and demonstrated that she was neither impartial nor disinterested, the foreperson later gave perjured testimony about those calls, and significant uncertainty remains whether the foreperson received extrajudicial information.

3. Whether, in a case involving admitted and extreme juror misconduct, the District Court improperly restricted investigation into 71 phone calls (totaling nearly 18 hours) that the jury foreperson made during trial to two other jurors, some of which occurred after the foreperson called five media outlets, because that type of inquiry might reveal "romantic relationships" between jurors.

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PETITION FOR A WRIT OF CERTIORARI

Brandon Leon Basham ("Basham") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The March 30, 2009 opinion of the Court of Appeals is reported at 561 F.3d 302 and reprinted in the appendix to this petition ("Pet. App.") at 1a-72a. The District Court's March 14, 2005 memorandum opinion denying Basham's motion for a new trial is unpublished and reprinted at Pet. App. 73a-92a.

JURISDICTION

The Court of Appeals entered its judgment on March 30, 2009 and denied a timely petition for rehearing and rehearing en banc on June 26, 2009. Pet. App. 107a. On September 9, 2009, this Court granted an application to extend the time to file a petition for a writ of certiorari to November 23, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a federal criminal defendant's constitutional right to an impartial jury under the Sixth Amendment, which provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

STATEMENT OF THE CASE

A. Introduction

Shortly after the jury recommended that Brandon Basham be sentenced to death, evidence surfaced that the jury foreperson had called three television stations and two newspapers during the penalty phase of the trial; had sought more publicity about the case and an "on camera interview" after the jury returned its verdict; had expressed "concern" and "fear" to the media that her fellows jurors would not impose the death penalty; had "cornered" other jurors during trial and made them uncomfortable; and had spent 18 hours on the phone with two other jurors during the guilt and penalty phases of the trial. The District Court described the foreperson's contacts with the media during trial and efforts to generate publicity as "unprecedented in the history of legal jurisprudence." Basham Hr'g Tr. 10-11, Feb. 14, 2005.

The lower courts' resolution of claims arising from these undisputed facts involves several issues about which the circuit courts are openly divided: specifically, (1) whether juror bias, prejudgment, and lack of impartiality constitute structural error or, instead, are subject to harmless error analysis; (2) whether the prosecution must overcome a presumption of prejudice upon proof that a juror has been exposed to extrajudicial contacts and, if so, how that presumption is overcome; and (3) whether all evidence of potential prejudice must be investigated before a court may conclude that the prosecution has overcome the presumption of prejudice, if it attaches.

In 2002, Basham and a co-defendant whose trial was severed, Chadrick Fulks, engaged in a two-week, multi-state crime spree that left two women dead. Basham was charged with several federal offenses in the District of South Carolina, including carjacking and kidnapping resulting in the death of Alice Donovan. The United States sought the death penalty. Basham was convicted of these and other offenses at the guilt phase of the trial, and that determination is not further challenged here. At sentencing, there was a substantial issue to be decided. The United States contended during Fulks's trial that Basham was nothing but Fulks's "puppet" during the commission of these crimes, and there was substantial evidence to support that view. And as part of his mitigation case, Basham offered evidence that he was neglected and physically and sexually abused as a child, that he suffered from a brain impairment and serious mental illness, and that he was easily influenced by others, particularly older men. Nevertheless, the jury sentenced Basham to death.

Immediately following the trial, a news producer called the prosecutor to say that she had received a call from a juror during the trial. Investigation established that during trial the jury foreperson, Cynthia Wilson, had called three local television stations and two newspapers. Most significant, in a six-minute call with the news producer from WSPA, a television station in Spartanburg, South Carolina, Wilson asked why the station was not covering the case, expressed "concern" over whether Basham would be sentenced to death because "there were jurors that were for the death penalty and others that

were not," and requested an "on-camera interview" after the jury returned its verdict.

Both the District Court and the Court of Appeals rejected claims that Wilson's conduct denied Basham of a trial by a fair and impartial jury. The Court of Appeals held that Wilson's extreme misconduct and prejudgment of the case was not a structural error in the proceedings and that Basham was required to prove prejudice. And though the court held that Basham was entitled to a presumption of prejudice because of Wilson's extrajudicial contacts, it concluded that the District Court had not abused its discretion in concluding that the prosecution had overcome that presumption. The Court of Appeals based its ruling simply on the District Court's finding that "Wilson received no substantive information during these phone calls." Pet. App. 29a. In a footnote, the Court of Appeals also ruled that the District Court had not abused its discretion by failing to investigate 71 phone calls Wilson had made to two other jurors during trial.

There is an old adage, often true, that hard cases make bad law. The crime spree in this case – described in extensive detail by the Fourth Circuit – was appalling, and two innocent women were killed and never found. But the question of whether Basham should be executed for those crimes was closely contested, and Basham was denied his right to a fair and impartial jury to decide that question. This Court will decide this Term whether Jeffrey Skilling is entitled to a new trial based on his claim that the Fifth Circuit erred in ruling that the United States had overcome a presumption that Skilling was

prejudiced by significant pretrial publicity. The Court also should consider whether Brandon Basham is entitled to a new trial because the United States could not, and did not, overcome the obvious prejudice resulting from the fact that the jury foreperson in his case repeatedly disregarded the trial court's instructions, initiated numerous contacts with local new organizations, demonstrated she had prejudged Basham's case, and sought an on-camera interview for her own glorification. As in Skilling's case, this case presents substantial issues concerning the constitutional right to a fair and impartial jury, about which there is disagreement in the lower courts. For these reasons, petitioner respectfully requests that the Court grant his petition for certiorari.

B. Factual Background and Trial

Basham was convicted of crimes he and Fulks committed after escaping from a county jail in Kentucky. Pet. App. 2a. Basham had been serving time for passing bad checks and had no history of violent crime. *See United States v. Fulks*, 454 F.3d 410, 414 (4th Cir. 2006). In contrast, Fulks – Basham's cellmate – had a history of beating and sexually assaulting women. *Id.* at 413. Following their escape, Fulks and Basham committed a string of offenses across several states, including Kentucky, Indiana, West Virginia, and South Carolina. Their actions resulted in the deaths of two women: Samantha Burns, a college student at Marshall University in West Virginia, and Alice Donovan, a 44-year old from South Carolina. Pet. App. 5a-7a. Burns was abducted from a J.C. Penney parking lot in Huntington, West Virginia. Donovan was abducted

from a Wal-Mart parking lot in Conway, South Carolina. Neither woman's body has been recovered.

Fulks was tried first. He was found guilty and sentenced to death. *Fulks*, 454 F.3d 410. During Fulks's trial, the United States contended that Fulks was "driving this train," that Basham "was a puppet," and that Fulks was "pulling [Basham's] strings throughout a lot of this crime spree." Fulks Trial Tr. 35, 53, 55, 66, June 29, 2004.

Basham's trial began after Fulks was sentenced. Basham did not deny his participation in the underlying events, but contended that he did not intend for anyone to die and that Fulks had committed the killings. The jury found Basham guilty of the charged offenses.

During the penalty phase, Basham presented evidence of his neglect and physical abuse by his parents, his sexual abuse at the hands of a family friend, his mother's use of narcotics to calm him down, and his lifelong struggles with mental illness and drugs. Pet. App. 16a-17a. Basham was treated at numerous mental institutions throughout his youth, and his IQ dropped from 101 when he was first tested at age seven to 68 when he was tested in 2003. 4th Cir. JA 2440-41. A defense expert testified that Basham suffered from a brain impairment and that his mental condition led him to be highly dependent on others, particularly older men. *Id.* at 2631.

On November 2, 2004, the jury returned a verdict sentencing Basham to death.

C. Post-Trial Proceedings

A day after the death verdict, Shannon Mays, a producer with television station WSPA, contacted the Assistant United States Attorney in charge of the case. Mays explained that an unidentified female juror in the Basham case had called her television station and that the two had spoken about the case prior to the jury's sentencing decision. *Id.* at 2851-52. The AUSA notified the District Court and defense counsel, and the court conducted a hearing at which Mays testified. The court determined that the juror involved was Cynthia Wilson, the jury foreperson; that her call with Mays lasted for six minutes; and that the call occurred during the penalty phase of the trial, prior to the close of the prosecution's rebuttal case (and hence prior to closing arguments and instructions). Pet. App. 79a.

Mays said that a female juror called the news desk, identified herself as a juror in the Basham case, and asked "why [the network] wasn't covering the case." 4th Cir. JA 2853. The juror told Mays that Basham's trial would make "good TV" because "Basham was acting up in court" and had "fallen asleep" during the trial. *Id.* The juror also asked if Mays was "familiar with the case." Mays responded that she knew of the case from having worked in Indiana near where Basham and Fulks had traveled after escaping from jail. *Id.* Mays testified that her response prompted the juror to ask more "questions about that," and that the juror's demeanor was "inquisitive." *Id.* at 2853, 2858.

Most significant, Mays testified that "there was some concern on [the juror's] part over whether or not

Mr. Basham would be sentenced to death, because there were jurors that were for the death penalty and others that were not." *Id.* at 2853. Mays later stated that the juror's "fear was that there would be issues during deliberations . . . because some were for the death penalty and others were not" and reiterated that the juror was "fearful that [the jury] would not reach a death verdict." *Id.* at 2866. Finally, Mays testified that before hanging up, the juror requested an "on camera interview" after the jury returned its verdict. *Id.* at 2854. Mays testified that she responded in words like, "Appreciate the phone call, call us when you can talk on camera." *Id.* at 2866. When asked by Mays, the juror refused to identify herself over the phone. *Id.* at 2853.

After the court's investigation ruled out two other female jurors, the court called Wilson to testify. Wilson was allowed to consult with counsel, and her attorney spoke first. He stated that he had "been counseling with her, and her mind is not completely clear right now," and that "[s]he's extremely nervous." *Id.* at 2903. Then, under oath, Wilson admitted calling WSPA and two other television stations. *Id.* at 2904. She denied doing anything else that would have violated the court's strict orders not to discuss the case during trial. *Id.* at 2909.

Wilson testified that she made the calls because of the "nature of the crime" and because she "wanted people to be aware." *Id.* at 2907. She also admitted that her husband had searched the Internet for information about Basham and his case, but she claimed that she had not discussed the case with him. *Id.* at 2909. Wilson's husband denied discussing the

case with her, but he testified that, after Wilson was selected as a juror, she was "excited about being chosen" and had told him that "this is a big opportunity for me." *Id.* at 3002.

Wilson's testimony contradicted that of Mays in several respects. The District Court expressly credited Mays over Wilson, *id.* at 3074, and the court acknowledged that it essentially had found that, among her other transgressions, Wilson had committed perjury, *id.* at 3069.

The court then tried to assess whether Wilson and other jurors had engaged in premature deliberations. Juror Shelda Richardson testified that Wilson had discussed the case during the penalty phase, *id.* at 2945, and that Wilson "had basically already had her mind made up to a certain degree," *id.* at 2970. Richardson said that Wilson would try to "feed you information to feel you out to see where you are, as far as which way you are leaning," and that she saw Wilson talking to other jurors in a similar manner. *Id.* Wilson's probing made her so "uncomfortable" that Richardson had to remind Wilson that the jurors "ha[d] to hear all the evidence in the case" before rendering a judgment. *Id.* at 2970. Wilson admitted during the post-trial hearing that she had been aware during the penalty phase that Richardson was hesitant about imposing the death penalty, *id.* at 2998-99, making her attempts to gauge and influence Richardson's views particularly troubling.

Juror June Robertson corroborated Richardson's testimony in key respects. Robertson testified that "in the jury room [Wilson] would, you know, like sit beside someone and you could see – I don't know what

they were discussing, if they were discussing the case or what. . . . But I did see her sort of corner people and talk with them." *Id.* at 2955-56.

Defense counsel then sought and obtained phone records establishing that, in addition to the three calls Wilson admitted making to local television stations, Wilson had placed calls to two local newspapers during trial that she had failed to disclose to the District Court. *Id.* at 3052. When called to testify again, Wilson claimed she did not recall those conversations. Phone records showed that all of the calls to the media outlets occurred on the same night.

The court later heard testimony from Stephanie Moore, a second news person who had spoken with Wilson during trial. Moore, a news researcher with a television station in upstate South Carolina, testified that she was familiar with Basham's case, had received a call from Wilson, and "could have said something to [Wilson] about my knowledge of the case." *Id.* at 3133. Wilson claimed not to recall any discussion with Moore. *Id.* at 3149. The court was unable to identify any employee with the third television station or the two newspapers with whom Wilson had spoken. Pet. App. 80a.

Wilson's phone records also revealed 71 phone calls between Wilson and two other female jurors during the trial, totaling almost 18 hours of conversation time. 4th Cir. JA 3234-37. There were many lengthy calls during the penalty phase of the case, including after Wilson's calls to the media. *Id.* For example, the day before penalty-phase closing arguments, and after Wilson spoke with the media

outlets, Wilson talked to a fellow juror for a total of almost two hours. *Id.* at 3237. Nevertheless, the District Court refused to investigate the content of the 71 calls, including whether Wilson had discussed her conversations with the media. The court explained, "I've [had] situations . . . where jurors form romantic relationships . . . and I'm not too sure it's anybody's business what jurors talked about." *Id.* at 3184.

The District Court regarded Wilson's calls to the media as an attempt to raise her public profile – to do "an on-camera interview after the verdict came in as the forelady of a jury in an important case." *Id.* at 2982. But the court denied Basham's motion for a new trial. Pet. App. 73a-92a. In a memorandum opinion, the court determined that Basham was entitled to a "rebuttable presumption" of prejudice under *Remmer v. United States*, 347 U.S. 227 (1954) ("*Remmer I*"), but that the Government had rebutted the presumption. Pet. App. 90a. Further, conflating all the facts present in the case to generic "misconduct," the District Court rejected Basham's claim that Wilson's actions constituted "a structural error that should not be subjected to a harmless error analysis." Pet. App. 90a.

The court did find that Wilson's actions were "a contempt of court of the highest order." Pet. App. 101a. The court noted that it had instructed the jurors on 41 occasions not to discuss the case, and it emphasized that Wilson had failed to be completely forthcoming in her testimony. Pet. App. 98a, 101a-102a. Finding that Wilson's "contumacious conduct strikes at the heart of the system of justice that we all

hold dear," the court ordered Wilson to disgorge her juror pay and to perform 120 hours of community service. Pet. App. 103a-104a. But it granted no relief to Basham.

D. Direct Appeal

Basham appealed the District Court's denial of his motion for a new trial to the Court of Appeals for the Fourth Circuit, which affirmed. Pet. App. 1a-72a.[1]

After a long presentation of the facts underlying the crimes, the court rejected in a footnote Basham's claim that Wilson's extensive misconduct and prejudgment of his case constituted a structural error that required a new sentencing hearing without further proof of "prejudice." Pet. App. 27a n.8. The court held that the error challenged by Basham was not subject to structural error analysis, and that "claims of juror misconduct and bias" are instead subject to a harmless error analysis. Pet. App. 27a n.8 (internal quotation marks omitted). Even under that standard, the court never considered whether Wilson's clear prejudgment that Basham should be executed, her expressed "concern" and "fear" to the media during trial that other jurors would not agree to impose the death penalty, and her personal interest in generating more publicity for the case and an "on camera interview" for herself, ever could be viewed as "harmless." *See* pp. 20-21, *infra* (discussing cases concluding that such harmless error analysis is impossible and inappropriate).

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[1] Basham also raised other issues that are not presented here.

The court then considered whether Wilson's extrajudicial contacts required a new trial. The court held that "Wilson's contact with the news media outlets constituted improper external communications and triggered the *Remmer I* presumption of prejudice." Pet. App. 27a. However, the court then ruled that because the District Court had made an "express finding that Wilson received no substantive information during these phone calls," the Court of Appeals could not conclude that the District Court had "abused its discretion" in denying Basham's motion for a new trial. Pet. App. 29a. The court so held despite the length of some of the calls (six and four minutes), their occurrence at a critical point in the trial, the fact that the District Court had found that Wilson had lied in her testimony and was not a credible witness about what had occurred, the fact that certain of the news persons had said that they had, or may have, provided information about the case to Wilson, the fact that no account from the news media had been obtained about three of the calls, and the fact that Wilson clearly had a personal interest in the case and sought to capitalize on her role as jury foreperson through on-camera television interviews. The Court of Appeals stated that the District Court's conclusion not to grant a new trial "may not have been inevitable, but it plainly was not an abuse of discretion." Pet. App. 31a (internal quotation marks omitted).

The Court of Appeals also relegated to a footnote Basham's claim that the District Court should have further investigated the nearly 18 hours of phone calls during trial between Wilson and two other jurors. Pet. App. 29a n.9. Citing the "broad

discretion" afforded district courts in choosing how to handle a claim of juror bias or misconduct, the Court of Appeals found no "abuse of discretion" in this case. The Court of Appeals emphasized that there was "no evidence" that Wilson informed the other jurors of the media contacts, even though it was precisely through investigation into these 18 hours of calls that such evidence might have been uncovered. The Court of Appeals did not address the District Court's rationale that it would not allow investigation into these 18 hours of calls, all of which were between three female jurors, because the court had seen situations where jurors had formed "romantic relationships."

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION BECAUSE WILSON'S BIAS, PREJUDGMENT, AND PERSONAL INTEREST CONSTITUTE STRUCTURAL ERROR, AND BECAUSE THE CIRCUITS ARE DIVIDED WHETHER SUCH JUROR BIAS CAN EVER BE HARMLESS.

The Sixth Amendment guarantees the "impartiality of any jury that will undertake capital sentencing." *Morgan v. Illinois*, 504 U.S. 719, 728 (1992). While "most constitutional errors can be harmless," *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991), the violation of "a defendant's right to an impartial adjudicator, be it judge or jury," is a structural error that compels reversal. *Rivera v. Illinois*, 129 S. Ct. 1446, 1455-56 (2009) (quoting *Gomez v. United States*, 490 U.S. 858, 876 (1989)); *see also Gray v. Mississippi*, 481 U.S. 648, 668 (1987);

Chapman v. California, 386 U.S. 18, 23 (1967); *cf. generally Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009); *Tumey v. Ohio*, 273 U.S. 510 (1927). As this Court has said, a "fair trial in a fair tribunal is a basic requirement of due process," and "[f]airness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. 133, 136 (1955). Accordingly, if a biased juror "sat on the jury that ultimately sentenced petitioner to death . . . the sentence would have to be overturned." *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988).

Despite ample evidence of the jury foreperson's partiality, both courts below brushed aside Basham's structural error claim with little analysis. The Court of Appeals relegated its discussion to a footnote, where it simply stated that Basham's claim of juror bias was subject to harmless error analysis. Pet. App. 27a n.8. That ruling cannot be squared with this Court's precedents, and it adds to the confusion among the circuit courts regarding the proper treatment of claims of juror bias.

1. Undisputed evidence demonstrates that Wilson prejudged Basham's case before hearing all the evidence, closing arguments, and instructions. The evidence also shows that Wilson was not disinterested and impartial because she sought to generate publicity about the case and then to bask in the media spotlight as the foreperson of the jury that delivered the death verdict. Wilson's bias and prejudgment is a structural error that compels a new sentencing hearing.

Wilson's unguarded, out-of-court statements to Mays and her pre-deliberation conduct in the jury

room reveal her prejudgment. The District Court credited Mays's testimony that Wilson expressed "concern" and "fear" that her fellow jurors "would not reach a death verdict." 4th Cir. JA 2853, 2866, 3074. Juror Richardson corroborated that conclusion, testifying that Wilson "basically already had her mind made up" during the penalty phase. *Id.* at 2970. And Wilson's probing attempts to discern Richardson's views during trial (which made Richardson "uncomfortable"), knowing that Richardson was unsure about imposing the death penalty, is further evidence of Wilson's premature judgment. *Id.* at 2970, 2998-99.

Wilson also was not impartial because she had a personal interest in the outcome of the case. Her attempts to generate additional publicity during trial and her request for an on-camera interview after the jury returned its sentencing verdict show that Wilson wanted to use her jury service as a conduit for her own media spotlight. *Id.* at 2854. Her admission to her husband upon her selection that she was "excited" and thought that jury service could be a "big opportunity" for her suggest that she had designs on such stardom from the outset. *Id.* at 3002. Her disregard of 41 explicit instructions from the court not to discuss the case, Pet. App. 98a, and the fact that she "committed perjury" when confronted with her misconduct in the post-trial hearings, 4th Cir. JA 3069, is further evidence of her bias, personal interest, and zeal to ensure that Basham received the death penalty. *Cf. Clark v. United States*, 289 U.S. 1, 10 (1933) ("Bias is to be gathered from the disingenuous concealment which kept her in the box.").

This Court long has held that "a juror who has formed an opinion cannot be impartial." *Reynolds v. United States*, 98 U.S. 145, 155 (1878). A juror who decides the case during the trial is no less biased than a juror who decides the case before the trial begins. Neither is able to "conscientiously apply the law and find the facts," *Wainwright v. Witt*, 469 U.S. 412, 423 (1985), because "[t]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average [person]." *Irwin v. Dowd*, 366 U.S. 717, 727 (1961). Particularly in the death penalty context, a juror who does not keep an open mind until all the evidence is presented, all the arguments are made, and all the instructions are given, does not meet this Court's standard for impartiality.[2] *See, e.g., Morgan*, 504 U.S. at 728 (potential juror was not impartial because he stated he would automatically vote for the death penalty if he found the defendant guilty); *Darden v. Wainwright*, 477 U.S. 168, 178 (1986); *cf. Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) (making clear that, under the Eighth Amendment, capital juries "must be able to give meaningful consideration and effect to all mitigating evidence").

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[2] The District Court instructed the potential jurors on this precise point. *See, e.g.*, Basham Trial Tr. 293, Aug. 30, 2004 ("[W]e need to be sure that we don't put anyone on the jury who would become so prejudiced at any point during the trial that they would refuse to consider evidence from that point forward."); *id.* at 300 ("It is critically important that we select a jury that can be completely fair and open-minded and not reach a decision in the case until all of the evidence is in and after the jury has heard my instructions on the law.").

This Court has found juror bias – and ordered a new trial – on far less conclusive facts than those presented here. In *Turner v. Louisiana*, 379 U.S. 466 (1965), two deputy sheriffs who were in charge of the sequestered jury were also prosecution witnesses. Despite no evidence that the deputies spoke to the jurors about the case, and no testimony from the jurors that they were affected by the presence of the deputies, this Court overturned the conviction on Sixth Amendment grounds because "it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution." *Id.* at 473.

This Court also has found juror bias on predominantly circumstantial evidence in two pre-trial publicity cases. In *Irwin*, a death penalty case, there was widespread negative news coverage of the defendant before the guilt phase began. During voir dire, eight of twelve eventual jurors stated that they thought the defendant was likely guilty, but all twelve jurors maintained that they could be fair and impartial to the defendant. 366 U.S. at 727-28 This Court discounted the jurors' claims of impartiality and ordered a new trial. In *Rideau v. Louisiana*, 373 U.S. 723 (1963), three jurors had seen a taped confession by the defendant two months before the trial began. The jurors testified that they could "lay aside any opinion, give the defendant the presumption of innocence as provided by law, base their decision solely upon the evidence, and apply the law as given by the court." *Id.* at 732 (Clark, J., dissenting) (quoting *State v. Rideau*, 137 So. 2d 283, 295 (La. 1962)). Yet this Court ordered a new trial

without even "pausing to examine a particularized transcript of the voir dire examination" because the risk of juror bias was too severe. *Id.* at 727.[3]

As Justice O'Connor wrote, "[d]etermining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring). *Turner*, *Irwin*, and *Rideau* corroborate that assertion, as each rests its finding of juror bias on circumstantial evidence rather than on the admissions of the jurors themselves. This case is the rare one in which a juror revealed her premature judgment to an outside source, and did so in the process of trying to create a public platform for herself.

As Judge Kozinski wrote in *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (en banc):

> The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent. Whether the desire to serve is motivated by an overactive sense of civic duty, by a desire to avenge past wrongs, by the hope of writing a memoir or by

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[3] Although *Turner*, *Irwin*, and *Rideau* involve claims that multiple jurors were biased, a single biased juror – as in this case – undermines the impartiality of the jury. *See Morgan*, 504 U.S. at 734 n.8 ("the measure of a jury is taken by reference to the impartiality of each, individual juror"); *Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) (holding that an impartial jury consists of "12, not 9 or even 10, impartial and unprejudiced jurors").

> some other unknown motive, this excess of zeal introduces the kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out.

Id. at 982.

Wilson's bias, predetermination of the case, and declared personal interest in the proceedings is a structural error based on this Court's established standards. Structural errors "deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (internal quotation marks omitted). They also defy harmless error analysis because of "the difficulty of assessing the effect of the error." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006).

The Court of Appeals therefore analyzed the case improperly by concluding that "the error complained of by the defendant is not subject to structural error analysis." Pet. App. 27a n.8 (quotation marks omitted). It would be impossible for a court to assess the effect of Wilson's conduct. There is no reasoned approach a court could take to decide whether Wilson would have decided to vote for the death penalty if she had not already decided that issue prematurely. Indeed, there is no reason to presume that Wilson, the foreperson of the jury, followed *any* instructions issued by the District Court, given the brazenness of her misconduct and her attempts to conceal it. Thus, under this Court's precedents, it is impossible in this

case "to hypothesize a . . . verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). "[A] reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, the wrong entity" determines the defendant's fate. *Id.* at 281 (internal quotation marks omitted).

2. The Fourth Circuit ruled in this case that "harmless error analysis has been applied to claims of juror misconduct and bias." Pet. App. 27a (internal quotation marks omitted); *see also Sherman v. Smith*, 89 F.3d 1134, 1139 (4th Cir. 1996) (en banc); *Fitzgerald v. Greene*, 150 F.3d 357, 365 (4th Cir. 1998). The First Circuit likewise has found that juror bias claims are subject to harmless error analysis. In *United States v. Tejeda*, 481 F.3d 44 (1st Cir. 2007), the defendant, Tejeda, argued that the jury was "not impartial" and that "this issue must be analyzed as structural error." *Id.* at 50. The court disagreed:

> Structural error analysis has been constricted in its use to a limited category of claimed errors, none of which fits this case. The Supreme Court has held that it is structural error for a criminal defendant to be tried before a judge who has a financial interest in convicting him. *Tumey v. Ohio*, 273 U.S. 510, 523, 535 (1927). Tejeda infers from *Tumey* that his claim that a juror is biased must also be analyzed as a structural error. This is not a situation in which one or more jurors has a financial interest in

> convicting the defendant. We reject Tejeda's argument.

Id.

Others circuits that have addressed the issue have concluded otherwise. Unlike the First Circuit – which reads *Tumey* to mean that only claims premised on a juror's financial interest in the case are subject to structural error analysis – the Ninth Circuit has held that, "[l]ike a judge who is biased . . . the presence of a biased juror introduces a structural defect not subject to harmless error analysis." *Dyer*, 151 F.3d at 973 n.2 (internal citations omitted); *see also United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000) ("[T]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.") (quotation marks omitted). The Second, Fifth, Sixth, Eighth, and Eleventh Circuits concur. *See United States v. Nelson*, 277 F.3d 164, 204 n.48 (2d Cir. 2002) (participation of a biased juror requires a new trial); *Virgil v. Dretke*, 446 F.3d 598, 607 (5th Cir. 2006) (denial of defendant's right to an impartial jury is a structural error); *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001) ("If an impaneled juror was actually biased, the conviction must be set aside."); *Johnson v. Armontrout*, 961 F.2d 748, 754 (8th Cir. 1992) ("If a defendant proves that jurors were actually biased, the conviction must be set aside."); *United States v. Carpa*, 271 F.3d 962, 967 (11th Cir. 2001) ("If a court determines that there was actual bias, the juror's inclusion in the petit jury is never harmless error.").

The Court should grant the petition to resolve whether Wilson's bias, prejudgment, and personal

interest compel reversal of Basham's death verdict under this Court's structural error cases.

II. THE COURT SHOULD GRANT THE PETITION TO RESOLVE CLEAR SPLITS AMONG THE CIRCUIT COURTS REGARDING THE METHOD FOR RESOLVING CLAIMS OF JUROR EXTRAJUDICIAL CONTACTS.

"In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Remmer I*, 347 U.S. at 229; *see also Mattox v. United States*, 146 U.S. 140, 150 (1892) ("Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict at least unless their harmlessness is made to appear."). "[T]he burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer I*, 347 U.S. at 229.

Although the Court of Appeals properly decided that the *Remmer* presumption applied in this case, Pet. App. 27a, its determination that the prosecution had rebutted the presumption conflicts with this Court's precedents and decisions of other circuits.

1. In assessing whether the prosecution had proved that Wilson's extrajudicial contacts were harmless to Basham, the Fourth Circuit admitted that "the timing of the communication[s], right before

jury instructions, is troubling." Pet. App. 29a. But it affirmed the District Court's finding of harmlessness because the evidence did not show that Wilson "received . . . substantive information" during the calls. Pet. App. 29a.

The courts below adopted an unduly narrow conception of "prejudice" that cannot be squared with this Court's decisions, which do not require the communication of "substantive information" for an extrajudicial contact to prejudice a defendant. *Remmer* itself is to the contrary, as in that case the potential juror was exposed only to a suggestion that he might "profit" by reaching a favorable verdict. No "substantive information" about Remmer's case was involved.

Further, this Court has found that a defendant can be prejudiced simply by the influence a third party may have on a juror, independent of whether any "substantive information" was conveyed. In *Parker v. Gladden*, 385 U.S. 363 (1966), this Court found that the defendant was prejudiced when the jurors heard the bailiff call the defendant "guilty" and "wicked." *Id.* at 363-66. In *Turner*, the Court found that the continuous association between the jurors and two deputy sheriffs who served as prosecution witnesses was prejudicial to the defendant even though there was no evidence that the deputies ever spoke to the jurors about the case. 379 U.S. at 473. As this Court observed, "even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent" in the situation. *Id.* Some convictions

simply must be reversed because they are reached under "circumstances" that are "inherently suspect." *Estes v. Texas*, 381 U.S. 532, 534 (1965).

In this case, even if it was appropriate for the courts below to undertake an examination of prejudice, such prejudice is readily apparent from Wilson's contacts with external sources during trial; her determined efforts to generate publicity for the case and for herself; her "inquisitive" attempts to learn more about the case from the media outlets she contacted; her efforts to pressure other jurors to see the case her way long before deliberations had begun; and the entire "circumstances" of this case that indeed are "inherently suspect." This Court should grant the petition to address the proper treatment of the type of extrajudicial contacts at issue here.

2. The lower courts are sharply divided over the proper treatment of claims involving extrajudicial juror contacts. The courts have diverged on three issues: the continuing vitality of the *Remmer* presumption; the type of evidence needed to rebut the presumption; and the degree of investigation required by *Remmer I* and *Remmer v. United States*, 350 U.S. 377 (1956) ("*Remmer II*").[4]

a. Most circuits agree with the Fourth Circuit that the *Remmer* presumption still applies. *See United States v. Greer*, 285 F.3d 158, 173 (2d Cir. 2002) ("It is well-settled that any extra-record information of which a juror becomes aware is presumed

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[4] Regarding the investigation required to rebut the presumption of prejudice resulting from an extrajudicial contact, *see* Part III, *infra*.

prejudicial."); *United States v. Simtob*, 485 F.3d 1058, 1064 (9th Cir. 2007) ("When there has been improper contact with a juror or any form of jury tampering – whether direct or indirect – we apply a presumption of prejudice."); *Wisehart v. Davis*, 408 F.3d 321, 326-28 (7th Cir. 2005); *United States v. Ronda*, 455 F.3d 1273, 1299 (11th Cir. 2006).

But as the First Circuit recently observed, "[t]here is an ongoing debate in the circuits about the limits on and the ongoing vitality of the presumption of prejudice rule announced in *Remmer*." *Tejeda*, 481 F.3d at 51. Certain circuits have limited the circumstances in which the presumption applies. The Tenth Circuit requires that the extrajudicial communication refer to "the matter pending before the jury." *United States v. Robertson*, 473 F.3d 1289, 1294-95 (10th Cir. 2007) (quotations omitted). The Third Circuit applies the presumption only if the extrajudicial contacts are of a "considerably serious nature." *United States v. Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001). And the Eighth Circuit does not apply the presumption unless an "extrinsic contact relates to factual evidence not developed at trial." *United States v. Rodriguez*, 414 F.3d 837, 846-47 (8th Cir. 2005); *see also United States v. Hall*, 85 F.3d 367, 371 (8th Cir. 1996) (declining to apply the presumption when the communications pertain solely to legal issues).

Four other circuits have abandoned the presumption, either expressly or impliedly. Citing *Smith v. Phillips*, 455 U.S. 209 (1982) and *United States v. Olano*, 507 U.S. 725 (1993), the Fifth and Sixth Circuits have held that the *Remmer*

presumption is no longer good law. *See United States v. Sylvester*, 143 F.3d 923, 933-34 (5th Cir. 1998) ("We agree that the *Remmer* presumption of prejudice cannot survive *Phillips* and *Olano*."); *United States v. Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988) ("*Smith v. Phillips* reinterpreted *Remmer* to shift the burden of showing bias to the defendant rather than placing a heavy burden on the government to show that an unauthorized contact was harmless."). And the First Circuit and the D.C. Circuit have expressed serious doubt about the continued vitality of the presumption. *See United States v. Bradshaw*, 281 F.3d 278, 287-88 (1st Cir. 2002) (questioning *Remmer*'s force and noting that the presumption applies only "where there is an egregious tampering or third party communication which directly injects itself into the jury process") (quotation marks omitted); *United States v. Williams-Davis*, 90 F.3d 490, 496-97 (D.C. Cir. 1996) (noting that the "court has in fact not treated the supposed 'presumption' as particularly forceful" and asking "whether any particular intrusion showed enough of a 'likelihood of prejudice' to justify assigning the government a burden of proving harmlessness").

The issue is important to this case. The District Court expressly found that Wilson "committed perjury" and was not a reliable source for what she discussed with five different media outlets. Two of the calls lasted for six and four minutes, rendering it difficult to believe that Wilson was not exposed to *some* extrajudicial information or influence, even if only a reporter's quip, affirmation of Wilson's feelings, or confirmation of information Wilson had learned. And the District Court was never able to obtain *any*

account of calls to three of the media outlets from an unbiased and credible source. Thus (and laying aside Basham's claim of structural error), it matters whether the presumption of prejudice required by *Remmer* applies here. If it does, then the uncertainty that remains in the record must be borne by the government, for it is presumed that the contacts that went unexplored prejudiced Basham. In other words, it matters whether the government had to eliminate all reasonable uncertainty about whether Wilson had received external information or been exposed to external influence as a result of her extrajudicial contacts. Although the Fourth Circuit ostensibly applied the presumption, if such a "presumption" truly exists, the prosecution cannot be found to have rebutted it on this record.

b. Given the marked state of confusion over whether the *Remmer* presumption still applies, it is not surprising that there also is sharp disagreement in the circuits regarding what it takes to overcome it. Like the Fourth Circuit below, certain circuits only find that the defendant was prejudiced if there is evidence that the extrajudicial contacts provided substantive information. The Eighth Circuit requires proof that an "extrinsic contact relates to factual evidence not developed at trial." *Rodriguez*, 414 F.3d at 846.

But decisions of this Court, other federal courts (even the Fourth Circuit in previous cases), and state courts dating back to our early history have not required the transmission of substantive information to find prejudice to the defendant in cases involving improper external contacts. *See Remmer II*, 350 U.S.

at 378; *Gold v. United States*, 352 U.S. 985, 985 (1957) (reversing and remanding for a new trial under *Remmer II* when an FBI agent asked three jurors whether they had received "propaganda literature"), *facts stated in Gold v. United States*, 237 F.2d 764 (D.C. Cir. 1956); *United States v. Vasquez-Ruiz*, 502 F.3d 700, 701 (7th Cir. 2007) (juror's discovery of the word "guilty" written in her notebook warranted new trial); *United States v. Cheek*, 94 F.3d 136, 140 (4th Cir. 1996) (granting new trial where stranger drove juror to police station and bail bondsman's office, and juror saw one of the defendants, even though record was clear that no substantive information had passed); *see also Commonwealth v. M'Caul*, 3 Va. 271, 302-06 (1812) ("Although there might be and probably was no tampering with any juryman in this case . . . more good will arise from preserving the sacred principle involved in this case, than evil from granting a new trial, although in this individual instance, a verdict has probably been given by twelve men in fact unbiased by the separation.").

This Court should grant the petition to clarify whether and when a presumption of prejudice applies in cases of extrajudicial contacts, what that presumption means, and how it is overcome.

III. THE COURT SHOULD GRANT THE PETITION TO ADDRESS THE EXTENT OF INVESTIGATION NEEDED TO OVERCOME A PRESUMPTION OF PREJUDICE.

In cases in which the *Remmer* presumption applies, this Court requires lower courts to explore the "entire picture" of potential prejudice before they may conclude that a defendant has not been denied

his right to an impartial jury. *Remmer II*, 350 U.S. at 379-80. Some circuits have enforced this mandate, but in this case, the Fourth Circuit affirmed the District Court's refusal to investigate plainly relevant information on the ground that investigation of conversations between jurors might reveal "romantic relationships."

1. In a footnote, the Fourth Circuit rejected Basham's contention that the District Court failed to adequately investigate the issue of prejudice by refusing to question jurors about the 71 phone calls Wilson made to two other jurors and whether Wilson imparted extrajudicial information during those calls. Pet. App. 29a n.9. The Fourth Circuit ruled that the District Court had not abused its discretion, noting the trial court's "searching inquiry that spanned nine hearings." Pet. App. 29a n.9. The point, however, is not how many hearings it took to uncover the full extent of Wilson's misconduct, but rather whether the court conducted a complete investigation into whether Basham was prejudiced by that misconduct.

The Fourth Circuit's holding conflicts with this Court's unanimous decision in *Remmer II*. Although the District Court on remand in that case received extensive testimony from 27 witnesses, including all members of the jury, *see United States v. Remmer*, 122 F. Supp. 673, 673-74 (D. Nev. 1954), this Court found that the hearing was inadequate because it focused on too narrow an issue. *Remmer II*, 350 U.S. at 379-80. Reversing and remanding to the District Court for a new trial, this Court explained that it remanded the case in *Remmer I* because it believed "that the entire picture should be explored" and that

"the paucity of information relating to the entire situation coupled with the presumption which attaches . . . made manifest the need for a full hearing." *Id.* at 379-80. The Court chided the District Court for its overly limited approach to the issue:

> The unduly restrictive interpretation of the question by the District Court had the effect of diluting the force of all the other facts and circumstances in the case that may have influenced and disturbed Smith in the untrammeled exercise of his judgment as a juror. We hold that on a consideration of all the evidence uninfluenced by the District Court's narrow construction of the incident complained of, petitioner is entitled to a new trial.

Id. at 382.

Remmer II's requirement that the lower courts investigate the "entire picture" is a corollary of the presumption applied in *Remmer I*. The prosecution must prove that the extrajudicial contacts were harmless, and so it must investigate all the ways the contacts might have prejudiced the defendant. *See, e.g., United States v. Moten*, 582 F.2d 654, 660 (2d Cir. 1978) ("It is clear that a very serious irregularity occurred during the trial of this case, and under the circumstances 'the entire picture should be explored.' . . . . After all, '[s]unlight is said to be the best of disinfectants.'") (quoting *Remmer II*, 350 U.S. at 379, and L. Brandeis, Other People's Money 62 (1933)). As with ordinary harmless error analysis, any uncertainty that remains after an incomplete investigation must be borne by the prosecution, which

has the burden of demonstrating harmlessness. "Where there is uncertainty as to the effect on the verdict, the error cannot be deemed harmless; rather, the court must treat the error as having affected the verdict." *United States v. Cunningham*, 145 F.3d 1385, 1394 (D.C. Cir. 1998).

In light of *Remmer II*, the courts below adopted an unacceptably constrained view of the required investigation. The nearly 18 hours of phone calls between Wilson and two other jurors are particularly troubling. Those calls were plainly relevant to any investigation into Wilson's contacts with five media outlets and her premature determination of the case. Given the evidence of extreme misconduct that already had come to light (slowly, because of Wilson's lack of candor, over the course of nine hearings), there was no reasonable basis to curtail investigation into those 71 calls because it theoretically could have revealed "romantic relationships" between jurors. Even if that were a realistic concern, it would surely be outweighed by the court's obligation to ensure the reliability of a death sentence.

2. Just as there is confusion over *Remmer*, lower courts also are split on the amount of investigation they must conduct before concluding, in a case in which the *Remmer* presumption applies, that a defendant's right to an impartial jury has not been violated. Contrary to the approach the Fourth Circuit followed below, the Third and Seventh Circuits demand inquiries into all potential avenues of prejudice before denying relief. In *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993), the District Court investigated allegations of jury misconduct that

surfaced pre-verdict by requiring jurors to fill out a questionnaire. *Id.* at 686. Each juror admitted to discussing the case prior to receiving the charge, but denied forming an opinion with respect to guilt. *Id.* at 688. The District Court conducted no further inquiry, and the defendant was convicted. *Id.* The Third Circuit reversed because the District Court's investigation had failed to produce a "record one way or the other regarding prejudice to the defendants." *Id.* at 690. The court ordered a new trial. *Id.* at 695.

In *Vasquez-Ruiz*, 502 F.3d at 701, the court granted relief because the District Court failed to develop "a record [sufficient] to evaluate the degree of prejudice that had developed, and to come to a reasoned conclusion on the question whether the curative steps were adequate." *Id.* at 706. As the court explained, "[u]nder *Remmer*, the burden is on the government to rebut the presumption of prejudice from an external influence on the jury," and "[w]e see no way that the government can satisfy that burden without developing all the information." *Id.* at 705; *see also Wisehart*, 408 F.3d at 327-28 ("[I]t was the state's burden, given the juror's affidavit, to present evidence that the jury's deliberations had not been poisoned.").

Thus, in addition to the other issues presented, the Court should grant the petition and address the type of investigation that is required when a juror in a capital case calls numerous media outlets during trial, and whether that investigation may be curtailed on the ground that it may reveal conversations about "personal" matters between jurors.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRANDON LEON BASHAM,
Defendant-Appellant.

No. 05-5.

Argued: Oct. 31, 2008.
Decided: March 30, 2009.

OPINION

WILLIAMS, Chief Judge:

A jury sitting in the District of South Carolina sentenced Brandon Leon Basham to death for the carjacking and kidnapping resulting in the death of Alice Donovan in 2002. In this appeal, Basham raises six claims of error relating to both the guilt and penalty phases of his capital trial: (1) the district court abused its discretion in failing to grant Basham's motion for a new trial or a new sentencing proceeding after learning that the jury foreperson contacted several news media outlets during the trial; (2) the district court abused its discretion in disqualifying Basham's appointed counsel prior to trial; (3) the district court abused its discretion in admitting prior acts as "intrinsic" to the charged crimes; (4) the district court abused its discretion in its evidentiary rulings during the penalty phase; (5) the district court erred in omitting the "catchall

mitigator," 18 U.S.C.A. § 3592(a)(8) (West 2000), from the special verdict form; and (6) his death sentence was rendered under "the influence of passion, prejudice, or any other arbitrary factor" in violation of 18 U.S.C.A. § 3595(c)(2)(A) (West 2000). For the following reasons, we reject Basham's contentions and affirm.

I.

A.

In 2002, Basham, a lifelong Kentucky resident, was serving the final years of a felony forgery conviction sentence at the Hopkins County Detention Center in Kentucky. In October of that year, Chadrick Evan Fulks became Basham's new cellmate. In early November, Fulks was charged with an additional (and serious) state offense, first degree abuse of a child aged twelve years or younger. On November 4, 2002, Basham and Fulks escaped the detention center together by scaling a wall in the recreation area and leaving the area on foot.

By the evening of November 5, Basham and Fulks reached the home of James Hawkins in nearby Hanson, Kentucky. Basham approached the dwelling, knocked on the door, and asked to use the telephone. Basham told Hawkins that his car had broken down and, after Basham made two calls, Hawkins agreed to drive him to a nearby convenience store. When Basham and Hawkins left the residence, Fulks joined them and the three men left in Hawkins's truck. The two men then told Hawkins that their vehicle was disabled in Robards, Kentucky, and they asked for a ride. During the

drive, Fulks told Hawkins that the disabled vehicle was actually in Indiana and directed Hawkins to drive there. Fulks later changed the directions again; by this point, Basham was pointing a knife at Hawkins to keep him driving to their preferred destination. At some point, Fulks took the wheel, drove the truck into a field, and ordered Basham to tie Hawkins to a tree. Fulks became dissatisfied with Basham's speed in tying and eventually completed the job himself. They left Hawkins clothed in shorts, flip-flops, and a short-sleeved vest. Fifteen hours later, Hawkins freed himself and flagged a passing motorist. When interviewed by police officers later that day, Hawkins identified Basham and Fulks as the individuals who kidnapped him.

After abandoning Hawkins, Fulks and Basham drove to Portage, Indiana, to visit one of Fulks's former girlfriends, Tina Severance.[1] They abandoned Hawkins's vehicle at a hotel and walked to a trailer shared by Severance and her friend Andrea Roddy. The four then drove to a hotel in northern Indiana and stayed there for the next few days. At some point, Basham and Roddy began a consensual sexual relationship.

During their time in Indiana, Fulks asked Severance if she knew anyone from whom he could obtain firearms. Severance informed Fulks that a friend of hers, Robert Talsma, kept several firearms

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[1] Tina Severance and Fulks met while Fulks was imprisoned in Indiana. Severance worked as a correctional officer at the facility where he served his sentence.

at his home; Severance and Roddy thereafter agreed to lure Talsma out of his house by offering to buy him breakfast. While Talsma was at breakfast with the women, Basham and Fulks entered Talsma's home and stole four firearms, a ring, and several blank checks. They then reunited with Severance and Roddy, and the four traveled in Severance's van to Sturgis, Michigan. That night, November 8, Basham and Roddy stayed at a hotel in Sturgis while Fulks and Severance drove to Goshen, Indiana, to smoke marijuana and methamphetamines with Fulks's brother, Ronnie Fulks.

That evening, two police officers began knocking on doors at the hotel where Basham and Roddy were staying in Sturgis. Basham opened his room door, saw the officers, closed the door, and cocked a .22 caliber revolver that he had stolen from Talsma. The officers ended up leaving before reaching Basham's door. Basham told Roddy, however, "I was about to shoot me a mother-f* * *er cop right. I was going to blow the f* * *ing cop away." (J.A. at 802.) The next morning, November 9, Basham and Roddy drove to a local Kmart to purchase sundries. Basham met a group of teenagers in the parking lot, and he reported to Roddy that they had some money and he wanted to kill them for it. After purchasing sundries with some of Talsma's stolen checks, Basham invited the teenagers back to the hotel room. Severance and Fulks arrived back at the hotel shortly thereafter, and the teenagers left. Fulks, Basham, Severance, and Roddy then drove Severance's van to the home of Fulks's brother, Ronnie Fulks, in Goshen, Indiana.

On November 10, 2002, the group of four drove to Piketon, Ohio, in Severance's van. Basham again used Talsma's checks to buy sundries, which Roddy later returned for cash. Basham and Fulks also bought two sets of camouflage clothing and Fulks stole a purse and cell phone from a Wal-Mart parking lot. On November 11, they drove to Kenova, West Virginia, near Huntington, and rented a hotel room. Fulks and Basham, wearing their sets of camouflage clothing, left the hotel room by themselves and did not return until the morning hours of November 12.

Samantha Burns, a nineteen-year-old Marshall University student, worked at the J.C. Penney's store in the Huntington Mall. In addition, Burns also participated in a school fundraiser by selling candy boxes, which she kept in her car. On November 11, Burns met her aunt at Penney's to purchase clothing for one of Burns's nieces; they parked in separate locations at the mall. At 9:46 p.m. that evening, Burns called her mother to say she was staying at a friend's house that night. Burns has never been seen since.

During the early morning hours of November 12, 2002, a local fire department responded to a reported explosion and fire at a rural area three miles outside of Huntington. The responding firemen found a car later identified as belonging to Burns burned out at a cemetery.

Meanwhile, Fulks and Basham returned to the hotel carrying muddy clothing, and Fulks indicated that they had stolen some money. Later that

morning, the group of four checked out of the motel and drove to South Carolina, where Fulks had lived for several years in the 1990s. Several facts emerged linking Basham and Fulks to Burns's disappearance. Roddy and Severance reported seeing mud, as well as one of Burns's candy boxes, in the van. In addition, Basham began wearing a heart-shaped ring around his neck that belonged to Samantha Burns. Basham told the women that he had stolen the candy from a girl selling it and that he had stolen the ring from a car. Roddy also found Burns's photo ID discarded with other items linking Burns to Fulks and Basham. Moreover, it was later revealed that Fulks used Burns's ATM card twice on the evening of November 11 at local banks.

The evening of November 12, Fulks, Basham, Severance and Roddy arrived at a motel in Little River, South Carolina. The next day was a day of relative rest; Fulks and Basham stole several purses and wallets from unattended vehicles, went shopping, and then returned to the motel room to smoke marijuana, drink, and play cards. On November 14, the four moved to a motel in Myrtle Beach, South Carolina. Fulks and Basham left the women and drove to nearby Conway, South Carolina. Hoping to steal firearms, Fulks and Basham burglarized the Conway home of Sam Jordan. Carl Jordan, Sam's father, drove up to the home as Fulks and Basham were leaving. Fulks attempted to ram Jordan's car with Severance's van but stopped short; Basham exited the house and fired a shot at a nearby greenhouse. Fulks then fired a shot that shattered the back-window of Jordan's car. Jordan fled the

area, with Fulks and Basham in pursuit, still firing. At some point, Fulks and Basham ceased their chase, abandoned Severance's van, and stole a truck, which they drove to the Wal-Mart in Conway.

Upon arriving at the Wal-Mart, Basham approached a blue BMW sedan driven by forty-four year old Alice Donovan. Basham entered the car and forced Donovan to drive to the back of the parking lot, where Fulks waited. There, Fulks entered the driver's side of the car and drove away; at 4:03 p.m., Fulks used Donovan's ATM card to purchase gas from a service station in Shallote, North Carolina. At 4:30 p.m., Donovan called her daughter to say she was shopping and would be home late. Later that day, several men at the Bee Tree Farms Hunt Club in Winnabow, North Carolina, saw two men and a woman in a blue BMW drive to the end of a road by the lodge, turn around, and leave the area. Donovan, like Burns, was never seen again.

Basham and Fulks returned to their Myrtle Beach motel later that day and told Severance and Roddy they had to leave town because Basham shot at some police officers and Severance's van had been seized. Basham and Fulks took Donovan's BMW and began driving to West Virginia, leaving Severance and Roddy behind in Myrtle Beach. Donovan's ATM card was used in Little River, Myrtle Beach, and Raleigh, North Carolina. Meanwhile, Severance filed a (false) police report alleging that her van had been stolen.

On November 15, 2002, Fulks and Basham arrived at the home of Beth McGuffin near

Huntington, West Virginia. McGuffin, a childhood friend of Fulks, agreed to let Fulks and Basham stay at her home. Fulks introduced Basham to her as "Tommy Blake." (J.A. at 1089.) Later on November 15, Fulks and Basham purchased crack cocaine to share. Basham and McGuffin also began a sexual relationship and had sexual intercourse three times over the next several days. Basham also gave McGuffin Burns's heart-shaped ring. On November 16, the three watched a news story about the disappearance of Samantha Burns. When McGuffin remarked that Burns was likely dead, Fulks stated, "[s]he is dead." (J.A. at 1127.)

At the same time, the Federal Bureau of Investigation ("FBI") was investigating the kidnapping of James Hawkins, which it believed Basham and Fulks had committed after escaping from prison. The FBI learned that the two men might be in Myrtle Beach, South Carolina, and that Severance had reported her van stolen. On November 16, the FBI and local authorities interviewed Severance and learned that Basham and Fulks had left the area. The FBI also became aware of the disappearance of Alice Donovan and suspected that Fulks and Basham might be involved.

On Sunday, November 17, Fulks, Basham, and McGuffin smoked marijuana before Fulks and Basham left McGuffin's house, telling her they were headed to Arizona. Instead, they stopped at the Ashland Mall in Ashland, Kentucky, about 20 minutes from Huntington. Sometime that evening, in a Wal-Mart parking lot, Basham approached Deanna Francis's fifteen-year-old daughter as she

entered the passenger side of their vehicle. Basham pointed a gun into the teenager's side, attempted to enter the car, and asked for directions to Greenville, Kentucky. When Basham realized Deanna's daughter was talking on her cell phone, he said "[M]y bad, I didn't mean to scare you" and walked away. (J.A. at 1640.) Deanna immediately called the police.

Ashland Police Officer Matt Davis was approximately four blocks from the Ashland Mall when he heard the dispatch about the attempted carjacking. Davis drove to the mall, where he saw Basham, who met the description of the suspected carjacker. Davis exited his patrol vehicle and approached Basham; Basham immediately began to flee. As Davis chased Basham through the mall area, Basham drew his weapon and fired a shot in the air. As the chase continued, Basham drew his weapon a second time, turned, and fired at Davis, who fired three shots of his own in return. Basham eventually made his way to a rail yard on the banks of the Ohio River where he hid. Davis radioed reinforcements, which surrounded the area. More than an hour later, at approximately 9:00 p.m., Basham surrendered to police, identifying himself as "Josh Rittman." (J.A. at 1244.) Police recovered a knife-later identified as belonging to Alice Donovan-and a crack cocaine pipe on Basham's person. Basham's pistol was recovered from a rail car several days later.

Fulks returned to McGuffin's home that evening and watched a news report on Basham's arrest. The morning of November 18, Fulks left McGuffin's residence to drive Donovan's BMW to his brother's

house in Goshen, Indiana. Fulks stopped at a rest area, where an Ohio state trooper, who had ascertained that the BMW was stolen, approached him; a high-speed chase then ensued at speeds in excess of 130 miles per hour. During this chase, Fulks nearly struck another trooper before managing to evade capture. Fulks eventually arrived at his brother's home in the early morning hours of November 20. Police officers were staking out Ronnie's home, however, and when Fulks, his brother Ronnie, and Ronnie's girlfriend drove to a barn to hide the BMW, Fulks was arrested. Fulks's semen and the bodily fluids from an unidentified female were later found in the back seat of the BMW.

Back in West Virginia, investigators determined that "Josh Rittman" was actually Basham, and that he was a recent prison escapee. At 2:00 a.m. on November 19, Basham was interviewed for the first time. Basham first told investigators that he and Fulks had escaped from prison and committed several crimes along the way. Later, he admitted that they had traveled to South Carolina and kidnapped a woman in Conway, South Carolina. Basham, however, insisted that the woman was alive and with Fulks.

At 9:45 a.m. on November 19, investigators re-interviewed Basham. Basham told investigators that he and Fulks kidnapped a man after escaping from prison, and carried firearms when kidnapping Donovan. He further told investigators that they used her credit cards to obtain cash, that they had driven Donovan to Ashland, Kentucky, and that Fulks was waiting for Basham when Basham was

caught. This time, Basham said he thought Donovan was dead because she was not with Basham and Fulks at the Ashland Mall. During this interview, Basham also told investigators that Fulks "got a girl" in West Virginia as well. (J.A. at 1505.)

On November 20, FBI agents interviewed Basham for seven hours. On this occasion, Basham told investigators that after they kidnapped Donovan, Fulks dropped Basham off at the hotel, drove Donovan to a resort area, raped her, tied her up, and left her. Basham also claimed that Fulks was the one who actually carjacked Donovan. Basham also clarified that when he said Fulks "got a girl" in West Virginia, that he meant they had stolen a girl's credit cards, not that they had kidnapped anyone else. (J.A. at 1530-31.) At this point, investigators believed Donovan may have been still alive . Basham drew a map of the places Fulks and Basham had been with Donovan. This map roughly corresponded with the Savannah Bluff area of Horry County, South Carolina. A two-day search of the area, however, left investigators no closer to discovering Donovan's fate.

On November 25, Basham, now represented by counsel, agreed to further aid investigators in finding Donovan's body. He drew a map, mentioned passing through a cemetery, and informed investigators that Donovan's body was left covered but unburied in the woods. Basham was unable to identify any specific landmarks to aid investigators.

On November 26, through counsel, Basham informed investigators that Samantha Burns was

dead and that he and Fulks had rolled her body down an embankment and into the Guyandotte River near Huntington.

Two days later, on November 28, FBI and state investigators organized a search team to search Brunswick County, North Carolina, for Donovan's body. Basham, now represented by Cameron B. Littlejohn, Jr. and William H. Monckton, VI, accompanied the agents. During the ride, Basham saw a deer and said, "I never could kill a deer and here I have," but was cut off before finishing his sentence. (J.A. at 1560.) Later that day, Basham told the investigators that he and Fulks had driven past a park, taken Donovan's body out of the car, dragged it into the woods, and covered it. On two occasions, Basham became emotional as he identified landmarks where he and Fulks had taken Donovan. Later, Basham told the investigators he had thrown out a Liz Claiborne purse strap at the Bee Tree Farms Cemetery. When they arrived, the local sheriff asked, "Is this where it happened?" (J.A. at 1576.) Basham responded, "This is it. It is." (J.A. at 1576.) The cemetery was searched to no avail. To date, Donovan's remains have not been identified.[2]

Starting in late November 2002, while in jail awaiting trial, Basham began writing letters to

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[2] Recently, acting on information and a map provided by Fulks, authorities discovered human remains in a wooded area of Horry County, South Carolina, which they believe to be those of Alice Donovan. Tonya Root, *Horry County Family Prays Remains Bring Peace*, Myrtle Beach Sun News (January 28, 2009), http:// www. myrtlebeach online. com/ news/ local/ story/ 761011. html.

McGuffin, telling her his real name, claiming that he loved her, that he had not "hurt that girl from South Carolina" (J.A. at 1133), and that Fulks was responsible for their crime spree. On this last point, Basham wrote that Fulks "lied to me" and "told me he had all kinds of money, and a new car, and all of this stuff just waiting on him, and all he needed me to do was to show him the way away from the jail because I was raised in that area." (J.A. at 1142.) Basham was not entirely forthright with McGuffin, however, as he also wrote that Burns's ring, which he had given to McGuffin, was "not stolen or anything like that." (J.A. at 1143.) Basham also confided that he "did a lot of bad s* *t with [Fulks]." (J.A. at 1146.)

On December 24, 2002, Basham called a former middle-school teacher in Madisonville, Kentucky, Clifford Jay. When Jay asked whether Basham had killed Alice Donovan, Basham replied, "Yes, Sir. We killed them." (J.A. at 1619.) Jay was surprised by the use of the term "them," because he had only heard about the Donovan killing.

B.

On December 17, 2002, both Basham and Fulks were charged in a three-count indictment by a grand jury sitting in the District of South Carolina for carjacking resulting in death, in violation of 18 U.S.C.A. § 2119 (West 2000), kidnapping resulting in death, in violation 18 U.S.C.A. § 1201(a) (West 2000 & Supp. 2008), and interstate transportation of stolen motor vehicles, in violation of 18 U.S.C.A. § 2312 (West Supp. 2008).

A superseding indictment was later filed, alleging a total of eight counts: carjacking resulting in death, in violation of 18 U.S.C.A. § 2119 (Count 1); kidnapping resulting in death, in violation of 18 U.S.C.A. § 1201(a) (Count 2); interstate transportation of a stolen vehicle, in violation of 18 U.S.C.A. § 2312 (Count 3); conspiracy to commit carjacking, kidnapping, interstate transportation of a stolen vehicle, felon in possession of a firearm, and possession of stolen firearms, in violation of 18 U.S.C.A. § 371 (West 2000) (Count 4); conspiracy to use, carry, and possess firearms during and in relation to, and in furtherance of, crimes of violence, in violation of 18 U.S.C.A. § 924(*o*) (West 2000 & Supp. 2008) (Count 5); using, carrying, and possessing firearms during and in relation to, and in furtherance of, crimes of violence, in violation of 18 U.S.C.A. § 924(c) (West 2000 & Supp. 2008)(Count 6); being a felon in possession of a firearm, in violation of 18 U.S.C.A. § 922(g) (West 2000) (Count 7); and possession of stolen firearms, in violation of 18 U.S.C.A. § 922(j) (West 2000) (Count 8). Counts 1 and 2 carried with them the possibility of a death sentence.

On September 13, 2003, the Government filed a notice of intent to seek the death penalty against Basham under 18 U.S.C.A. § 3593(a) (West 2000), the Federal Death Penalty Act ("FDPA"). The Government alleged two statutory aggravating circumstances: that Basham and Fulks murdered Donovan for pecuniary gain, 18 U.S.C.A. §

3592(c)(8),[3] and that Donovan's death occurred during a kidnapping, 18 U.S.C.A. § 3592(c)(1). The Government alleged several non-statutory aggravators: Basham's other acts of violence from November 4, 2002, through November 18, 2002; Basham's future dangerousness to other persons, including inmates; and the impact of Basham's acts on Donovan's family. Basham's and Fulks's cases were severed for trial on January 29, 2004. Fulks pled guilty and, after a penalty phase, was sentenced to death. We affirmed his conviction and sentence on direct appeal. *United States v. Fulks,* 454 F.3d 410 (4th Cir. 2006), *cert. denied,* ___ U.S. ___, 127 S. Ct. 3002, 168 L. Ed. 2d 731 (2007).

Basham's trial commenced on September 13, 2004. During the guilt phase, the Government produced testimony from eighty-nine witnesses, including Severance, Roddy, and McGuffin, as well as several of Basham's victims of related crimes: Hawkins, Jordan, Deanna Francis's daughter, and Officer Davis. Basham's post-arrest statements to the FBI were introduced, as were his statements to Clifford Jay and his letters to McGuffin. The carjacking and kidnapping of Donovan were captured on Wal-Mart surveillance videos, as were the ATM withdrawals made by Fulks with Donovan's ATM card.

During trial, Basham admitted culpability in the carjacking and kidnapping, but argued that Fulks committed Donovan's murder and was the instigator

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[3] This aggravator was not submitted to the jury. (Gov't Br. at 18.)

throughout the crime spree. To that end, during Basham's opening statement, counsel argued that the only "issue in controversy" was Basham's intent to commit serious bodily harm to Donovan at the time of the abduction. (J.A. at 530.) In framing this issue, Basham noted that he could not drive a car and had never been outside of Kentucky prior to the prison escape, that all of the places they visited were places from Fulks's past, and that Fulks was dominant and intelligent while Basham was more limited intellectually and passive. After a thirteen-day trial, the jury convicted Basham of all eight counts in the superseding indictment.

The penalty phase began on October 12, 2004. The Government introduced the trial record as its principal evidence, but also introduced testimony from correctional officers and a female nurse regarding Basham's misconduct, drug use, and sexual misconduct towards female employees in prison. The Government also introduced testimony from Donovan's husband, daughter, and sister regarding the impact Donovan's death had on their family. Finally, the Government entered a videotape showing a courtroom scuffle between Basham and the U.S. Marshals that occurred during the guilt phase of the trial.

In mitigation, Basham offered six statutory and thirty non-statutory factors. The six statutory factors were: (1) impaired capacity; (2) duress; (3) minor participation; (4) no prior violent criminal conduct; (5) emotional disturbance; and (6) other factors. *See* 18 U.S.C.A. § 3592(a). Most of the non-statutory mitigating factors related to Basham's

troubled youth and home life. In particular, Basham put forth evidence that his parents encouraged his bad behavior, forced him to steal to support their drug habits, and even introduced him to drugs. Basham was also sexually abused by one of his father's friends.

Basham also put forth mitigation evidence regarding his mental condition. Basham showed that he was diagnosed with learning disabilities at a young age and eventually placed into youth homes following his expulsion from school. Basham also put forth evidence suggesting that he had a deteriorating mental condition-to wit, Basham's IQ had declined from 100 as a youth to approximately 68 due to illegal drug abuse and other factors. Experts testifying on Basham's behalf diagnosed him as suffering from a brain impairment, multiple-cause dementia, drug-inhalant psychosis and anxiety. His psychiatrist admitted under oath, however, that these problems did not contribute to his offenses or keep him from distinguishing between right and wrong.[4] Finally, Basham put forth evidence of his ability to adapt to prison life through the testimony of prison officials.

On November 2, 2004, following a sixteen-day penalty phase, Basham was sentenced to death on Counts 1 and 2. The jury first found the threshold

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[4] To rebut the testimony of Basham's experts, the Government called its own expert witness, a psychiatrist, who testified that Basham suffered from antisocial personality disorder, a learning disorder, and substance abuse problems, but did not suffer from brain damage or dementia. (J.A. at 2663-83.)

factor that Basham intentionally engaged in an act of violence that created a grave risk of death. 18 U.S.C.A. § 3591(a)(2)(D) (West 2000). The jury further found the statutory aggravator that the death occurred during a kidnapping, as well as non-statutory aggravating factors that Basham: escaped from jail, killed Samantha Burns,[5] assaulted Carl Jordan, kidnapped and carjacked James Hawkins, attempted to murder Officer Davis, and impacted Donovan's family. The jury did not find the aggravator of future dangerousness. At least one juror found two of the six statutory mitigating factors and seventeen of the twenty non-statutory mitigating factors. The jury found four non-statutory mitigators unanimously as to either Count 1 or Count 2: family history of violence (Counts 1 and 2), parents' violence (Counts 1 and 2), that Basham's mother told him to steal (Count 1), and that Basham abused drugs (Count 1).

A sentence of 744 months imprisonment was entered on the remaining six counts. Basham's conviction and sentence of death were finally entered on February 16, 2005. Basham filed a timely notice of appeal later that same day. Basham's death sentence was authorized by the FDPA, 18 U.S.C.A. § 3594 (West 2000). We possess jurisdiction over Basham's appeal pursuant to 28 U.S.C.A. § 1291 (West 2006) and 18 U.S.C.A. § 3595 (West 2000).

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[5] Basham and Fulks subsequently pled guilty to carjacking resulting in death and were sentenced to life imprisonment for the murder of Burns. *See United States v. Fulks*, 454 F.3d 410, 416 n.1 (4th Cir. 2006).

On appeal, Basham raises six contentions of error, which we address in turn.

II. Juror Misconduct

We first consider Basham's argument that the district court should have granted his motion for a new trial after learning that the jury foreperson contacted several news media outlets during the penalty phase of the trial. As with several other arguments raised by Basham, additional factual background is needed to put this claim in proper context.

A. Factual Background

The jury returned a death sentence against Basham on November 2, 2004. On November 3, Shannon Mays, a news producer from WSPA, a television station in Greenville, South Carolina, called the Assistant United States Attorney ("AUSA") in charge of the case to inform him that she had been contacted by a woman purporting to be a juror on the Basham case during the trial. The AUSA inquired further and discovered that the female juror called and asked why WSPA was not covering the trial. The woman also told the producer she believed the jury would have a difficult time reaching a decision in the penalty phase because there were several jurors for and several against the death penalty. She also informed the producer that Basham had "acted out" in court and that there were some jurors from the upstate.[6] (J.A. at 3249.)

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[6] Greenville is located in what is considered "the upstate" region of South Carolina.

The AUSA immediately contacted the district court and defense counsel; during a November 10, 2004 status conference, the district court decided to call the female jurors from upstate South Carolina before the court. On November 12, a sealed hearing was held involving three female jurors from the upstate, as well as Shannon Mays. Mays testified that she knew of the Basham case because she covered Basham and Fulks's escape from prison when she worked for a news station in Indiana and had informed the juror of that fact during their conversation. She stated that she did not impart any other information to the juror and that the call lasted less than five minutes.

The district court, after offering them legal representation, then questioned each of the three female jurors from the upstate under oath. After consulting with counsel, the jury foreperson, Cynthia Wilson, admitted to calling not only WSPA, but also two other television stations while the trial was in progress. Wilson claimed that she made the calls in an effort to have the media do a profile piece on the dangers of shopping alone at malls. Wilson testified that none of the people she spoke with imparted any information to her, and that she did not pass along any specific information about the jury's thoughts or deliberations. Wilson further testified that the jury did not begin discussing the penalty portion of the case prior to the deliberations. Finally, Wilson testified that her husband followed the trial via the internet, but that he did not share any of his findings with her until after the trial. The other two female jurors declined the assistance of counsel, denied

having contacted any media outlets, and confirmed that they had not discussed the penalty portion of the case with anyone prior to the deliberations. Neither mentioned Wilson bringing any external information to their attention.

On November 18, the district court recalled the remaining nine regular jurors for questioning under oath, and it held another hearing on November 23, 2004, to question the alternates; Wilson; and her husband, Greg Wilson. During these hearings, none of the remaining jurors mentioned Wilson bringing any external information to their attention. One juror, Shelda Richardson, testified that she did not engage in premature deliberations, but that Wilson did, on occasion, ask her how she felt about certain issues and commented on witness testimony. Richardson testified that Wilson was an "either[/]or" person who "already had her mind made up to a certain degree." (J.A. at 2970.) Wilson testified that she had not engaged in any conversations with any juror about the facts or law of the case prior to the deliberations. Mr. Wilson confirmed that he had not discussed anything that he had found in his internet research with his wife.

On December 1, 2004, Basham moved for a new trial, a motion that the Government opposed. The district court then granted defense counsel's motion to obtain Ms. Wilson's phone records. During a December 13, 2004 hearing, the district court learned that the phone records revealed that Wilson made the calls on Friday, October 29, 2008, after the close of the evidence in the penalty phase but before

the jury instructions were given and the deliberations began.

Specifically, Wilson made a six-minute call to WSPA, two one-minute calls and a four-minute call to WHNS Asheville, a two-minute call to WYFF in Greenville, a two-minute call to the Greenville News, and a one-minute call to the Spartanburg Herald. These latter two calls to newspapers had not been reported by Wilson during her initial testimony.

The district court contacted these media outlets to find anyone who remembered speaking with Wilson. WHNS responded that no one could remember speaking with Wilson; WYFF responded that an employee, Stephanie Moore, had taken a call from a female juror on the Basham case and may have said something to the caller about the case. Both newspapers ultimately were unable to produce anyone who remembered taking a call from Wilson. The district court, noting the short duration of both of those calls, surmised that Wilson, calling on a Friday evening, most likely failed to reach anyone at the papers. Wilson was recalled to testify about these remaining contacts; she did not remember calling the newspapers. The district court also questioned Wilson about an eleven-minute call she made to another juror immediately prior to her calls to the media outlets. Wilson testified that she had simply offered that juror a landscaping job and did not discuss the case with him.

On January 14, 2005, Basham moved for further investigation after Wilson's telephone records revealed seventy-one calls between her and two other

jurors from September through October 2004. Several of these calls, according to Basham, occurred at critical moments during the trial. For instance, Wilson called both jurors on the day the jury rendered its guilt-phase verdict and called one of them again the day of opening arguments in the penalty phase. In addition, the day before closing arguments in the penalty phase, Wilson spoke four times with a juror for a total of almost two hours. Basham's defense counsel conceded during an earlier hearing, however, "I looked at the record ... [those two jurors] have been asked if they prematurely deliberated, they did not." (S.J.A. at 24.)

After holding a lengthy hearing, the district court denied the request for further investigation, finding that it credited those two jurors' statements that they did not deliberate prematurely and concluding that any further investigation would risk infringing on the jurors' privacy. As the district court explained, summarizing the breadth of its investigation "[w]e have heard from 16 jurors under oath and we have heard from Cynthia Wilson three times, and I've signed subpoenas for the defense lawyers to get dozens if not hundreds of telephone records." (J.A. at 3189.)

The district court held its ninth and final hearing on February 14, 2005, to consider Basham's motion for a new trial in full. By written order on March 14, 2005, the district court denied the motion for a new trial.[7] The district court concluded that Wilson's

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[7] During a separate hearing, the district court held Wilson in contempt of court for violating its instructions not to discuss the

contact counted as an improper external influence, triggering a presumption of prejudice under *Remmer v. United States,* 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954) *(Remmer I),* and its progeny. *See, e.g., Stockton v. Virginia,* 852 F.2d 740, 743-44 (4th Cir. 1988). The district court described the situation as follows: "This case presents a unique situation involving egregious misbehavior by a juror, but no showing that she learned anything or was influenced in any way." (J.A. at 3259.) Ultimately, the district court concluded that the Government had rebutted the presumption of prejudice because "the contact did not involve the defendant, the government, or any witnesses in the case," and Wilson "reached out to strangers to the suit who would have had no information other than what was available in the public arena." (J.A. at 3260.) And, "there is no evidence that the juror informed the other members of the jury about the phone calls." (J.A. at 3261.)

The district court rejected a similar argument by Basham that Wilson's "flagrant[ ] violat[ion]" of the court's instructions created a due process violation and a structural error. (J.A. at 3261.) The district court, citing *Sherman v. Smith,* 89 F.3d 1134 (4th Cir. 1996) (en banc), in which we declined an invitation to rule that juror misconduct was a structural error, found that "there has been no showing that the juror's actions in this case was anything other than harmless error." (J.A. at 3262.)

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case publicly. It fined Wilson $2,500 and ordered her to perform 120 hours of community service.

B. Legal Analysis

We review the denial of a motion for a new trial for abuse of discretion. *Fulks,* 454 F.3d at 431. However, in cases involving possible improper communication with jurors, "because the ultimate factual determination regarding the impartiality of the jury necessarily depends on legal conclusions, it is reviewed in light of all the evidence," and therefore we apply a "somewhat narrowed" modified abuse of discretion standard that grants us "more latitude to review the trial court's conclusion in this context than in other situations." *United States v. Cheek,* 94 F.3d 136, 140 (4th Cir. 1996) (internal citation and quotation marks omitted).

The Sixth Amendment includes an impartial jury clause, such that "[p]rivate communications, possibly prejudicial, between jurors and third persons, ... are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox v. United States,* 146 U.S. 140, 150, 13 S. Ct. 50, 36 L. Ed. 917 (1892). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (internal quotation marks omitted). This rule resulted in what is colloquially called the *Remmer I* presumption:

> [A]ny private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before

> the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer I, 347 U.S. at 229, 74 S. Ct. 450.

We apply a familiar process "for analyzing allegations of extrajudicial juror contact." *Cheek*, 94 F.3d at 141. First, "[t]he party who is attacking the verdict bears the initial burden of introducing competent evidence that the extrajudicial communications or contacts were more than innocuous interventions." *Id.* (internal quotation marks omitted). Second, upon satisfaction of this "minimal standard ..., the *Remmer I* presumption is triggered automatically." *Id.* And, "[t]he burden then shifts to the prevailing party to prove that there exists no 'reasonable possibility that the jury's verdict was influenced by an improper communication.'" *Id.* (quoting *Stephens v. S. Atl. Canners, Inc.*, 848 F.2d 484, 488-89 (4th Cir. 1988)). This "heavy obligation" requires the court to "examine the entire picture, including the factual circumstances and the impact on the juror." *Cheek*, 94 F.3d at 142 (internal quotation marks omitted).

In determining whether a communication is innocuous, we "turn to the factors the Supreme

Court deemed important." *Cheek*, 94 F.3d at 141. "These factors are: (1) any private communication; (2) any private contact; (3) any tampering; (4) directly or indirectly with a juror during trial; (5) about the matter before the jury." *Id.*

On appeal, Basham contends that the district court abused its discretion in finding that the Government met its heavy burden of rebutting prejudice, while the Government argues that it satisfied its burden. Applying our modified abuse of discretion standard, we affirm the district court's denial of the motion for a new trial.

The Government concedes that Wilson's contact with the news media outlets constituted improper external communications and triggered the *Remmer I* presumption of prejudice.[8] Thus, we must only answer whether there exists no "reasonable possibility that the jury's verdict was influenced by an improper communication." *Id.* Courts look at a variety of factors in determining if this standard has been met, including the extent of the improper communication, the extent to which the communication was discussed and considered by the jury, the type of information communicated, the timing of the exposure, and the strength of the

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[8] Basham contends that, given what he terms the "extraordinary confluence of juror misconduct," no showing of prejudice is required. Like the district court, we agree that "the error complained of by the defendant is not subject to structural error analysis." (J.A. at 3262.) *See Sherman v. Smith*, 89 F.3d 1134, 1139 (4th Cir. 1996) (en banc) (noting harmless error analysis has been applied to "claims of juror misconduct and bias").

Government's case. *See, e.g., Stockton,* 852 F.2d at 747 (considering the extent of exposure), *United States v. Lloyd,* 269 F.3d 228, 240-41 (3d Cir. 2001) (considering the timing of exposure, length of jury deliberations and structure of its verdict, and strength of Government's case); *United States v. Williams-Davis,* 90 F.3d 490, 497 (D.C. Cir. 1996) (considering the strength of Government's case, whether information gained was cumulative); *United States v. Blumeyer,* 62 F.3d 1013, 1017-18 (8th Cir. 1995) (same).

On balance, these factors indicate a lack of prejudice to Basham. First, the extent of the communication, the most important factor, was minimal; several phone calls to different media outlets, none lasting longer than six minutes. The district court found there was "no showing" that the media outlets even provided any information to Wilson. *See United States v. Sampson,* 486 F.3d 13, 41-42 (1st Cir. 2007), *cert. denied,* ___ U.S. ___, 128 S. Ct. 2424, 171 L. Ed. 2d 234 (2008) (finding no prejudice where communication between juror and witness, during which juror told witness he had a good memory, was "terse, fortuitous, and devoid of substantive content"); *Blumeyer,* 62 F.3d at 1016-18 (concluding that the presumption of prejudice does not even attach unless extraneous information relates to facts under deliberation and, even assuming it did, finding no prejudice where jury foreman asked lawyer hypothetical question about issue of law); *United States v. Diez,* 736 F.2d 840, 845-46 (2d Cir. 1984) (finding no prejudice where juror asked a law enforcement officer whether he

knew two witnesses in an ongoing trial). To the extent Wilson received any information, it was a statement from the WSPA news producer Shannon Mays that she had covered the case in Indiana when Basham and Fulks escaped; such information was obviously cumulative of what the jury had already heard. In addition, the district court found "no evidence" that Wilson "informed the other members of the jury about the phone calls." (J.A. at 3261.)

We admit the timing of the communication, right before jury instructions, is troubling. *See Waldorf v. Shuta,* 3 F.3d 705, 713 (3d Cir. 1993) (noting that exposure both the night before and day of the verdict was at a very critical moment). Courts rarely find external communication prejudicial, however, where, like here, the communications are "devoid of substantive content." *Sampson,* 486 F.3d at 41. Given the district court's express finding that Wilson received no substantive information during these phone calls, we cannot say that the district court abused its discretion in denying Basham's motion for a new trial.[9]

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[9] We likewise reject Basham's related contention that the district court failed to adequately investigate the issue of prejudice by failing to further question the jurors about the seventy-one phone calls Wilson made and whether Wilson imparted extrajudicial information during those calls or at any other time during the deliberations.

"The district court has broad discretion in choosing how to handle a claim of juror bias or misconduct." *United States v. Barnette,* 390 F.3d 775, 808 (4th Cir. 2004), *vacated on other grounds,* 546 U.S. 803, 126 S. Ct. 92, 163 L. Ed. 2d 32 (2005). "The Fourth Circuit follows the view that the trial court may deal with [claims of juror misconduct] as it feels the particular

In drawing this conclusion, we find relevant the First Circuit's following statement in *Sampson*:

> Here, moreover, the district court's inquiry was virtually a textbook model. The court's response was swift, its questioning pointed, and its search for any inkling of prejudice thorough. After making a face-to-face assessment of the juror's sincerity and of the possibility that other jurors had been contaminated, the court concluded that the interaction was harmless. That conclusion may not have been inevitable, but it plainly was not an abuse of discretion.

Id. at 42.

Likewise, the district court's inquiry here was a "textbook model." Immediately after being contacted by the AUSA, it called in the jurors potentially responsible for the communication. In total, the district court held nine hearings, subpoenaed phone records, questioned every juror and alternate, and carefully considered all the evidence concerning the

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circumstances require and only reverse for abuse of discretion." *United States v. Gravely*, 840 F.2d 1156, 1159 (4th Cir. 1988).

We find no such abuse of discretion in this case. As catalogued above, the district court conducted a searching inquiry that spanned nine hearings. More importantly, the district court found that Wilson did not receive any "knowledge" from the media outlets, (J.A. at 3260), and that there was "no evidence" that Wilson informed the other jurors of the media contacts, (J.A. at 3261). Given these factual findings, which we believe are amply supported by the record, we do not believe the district court abused its discretion in denying Basham's request for further inquiry.

communication. While, as in *Sampson,* the district court's conclusion was not necessarily "inevitable," it "plainly was not an abuse of discretion." *Sampson,* 486 F.3d at 42.

III. Disqualification of Appointed Counsel

Next, we consider Basham's argument that the district court should not have disqualified his appointed counsel prior to trial. We review a district court's disqualification of defense counsel for a conflict of interest for abuse of discretion. *Wheat v. United States,* 486 U.S. 153, 163, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

A. Factual Background

We begin by presenting additional facts necessary to resolve this claim. On November 20, 2002, the Government filed a criminal complaint against Basham and Fulks in the District of South Carolina. On November 27, 2002, the presiding magistrate judge appointed Cameron Littlejohn and William Monckton to represent Basham. On November 28, 2002, a search team consisting of Littlejohn, Monckton, Basham, and federal and state authorities scoured Winnabow, North Carolina, in Brunswick County, for Donovan's body. Near the end of the day, one of the FBI agents informed Monckton and Littlejohn that Basham would be given one more chance to help, since his suggestions that day had thus far failed to yield any results. After consulting with Basham, Littlejohn returned and said, "hypothetical[ly]," that Fulks raped Donovan in the back of the BMW, strangled her with a leather strap from her purse, and placed her in the trunk. (J.A. at

3295, 3397.) After driving away, Fulks became concerned that she was still alive. Fulks parked the BMW, returned to the trunk, and slit her throat. "Hypothetical[ly]," Littlejohn continued, the leather strap was at the Bee Tree Cemetery with Donovan's body. (J.A. at 3295.) That particular cemetery had previously been mentioned by Basham as a possible location for Donovan. The search team returned to the cemetery but still was unable to find Donovan's body.

Basham and Fulks were later indicted and, on January 13, 2003, the Government moved to disqualify Littlejohn and Monckton, over objection. The Government first argued that Littlejohn's statements were admissible, under Federal Rule of Evidence 801(d)(2)(D), as party admissions. The Government also contended that Littlejohn's statements were false because forensic testing revealed no blood in the BMW, as there would have been if Fulks had really slit Donovan's throat in the trunk. Thus, the Government believed Littlejohn's statements would show Basham was lying when, in other statements, he blamed Fulks for Donovan's death.[10] And, the possibility that Littlejohn would have to testify against Basham at trial created a conflict of interest requiring disqualification.

The district court appointed counsel to represent Littlejohn and Monckton and held hearings on

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[10] At the time the Government filed its motion to disqualify counsel, Basham's and Fulks's cases had not yet been severed for trial, and both Basham and Fulks had given statements implicating each other in the murders.

January 15, 2003 and April 4, 2003 on the disqualification issue. At the January hearing, Littlejohn testified that the FBI agent's version of the statement was inaccurate, and that he prefaced his statements with the word "hypothetical" because "it was not a verbatim statement. It was not being offered as a statement by the defendant." (J.A. at 142.) Littlejohn testified that he made no affirmation that Fulks stabbed Donovan *in her car,* so the statement did not contradict any forensic evidence the Government possessed. Basham, meanwhile, indicated that he had a good rapport with Littlejohn and Monckton and wanted to keep them as counsel. He did indicate, however, that he had not authorized Littlejohn to tell the FBI agents what they had discussed. Finally, both Basham and Littlejohn argued that disqualifying the attorneys could wreak havoc on the relationship between defense counsel and the Government. In particular, both Basham and Littlejohn contended that discussions between the Government and defense attorneys frequently involved hypothetical statements that neither believed to be admissible in a later proceeding.

On April 9, 2003, by written order, the district court disqualified Littlejohn and Monckton "out of an abundance of caution." (J.A. at 3406.) The district court announced several reasons for its decision: that (1) because of the cost of capital litigation, it wished to avoid "expensive and cumbersome post-verdict issues" (J.A. at 3402); (2) Basham's case was in its "infancy" and removal would "work no substantial hardship" and "eliminate a thorny issue that could

arise later" (J.A. at 3403); (3) the statement might be admissible at trial under several scenarios; (4) other conflicts of interest existed, because Basham argued that he never authorized Littlejohn to make the statement to the FBI agents; and (5) although Basham currently wanted to retain Littlejohn and Monckton, it was foreseeable that if Basham was sentenced to death, he would blame those attorneys for his situation and raise their potential conflict of interest on appeal.

The district court also rejected the policy argument that defense counsel's relationship with the Government in general would be affected if counsel were unable to offer the authorities hypothetical statements during pre-trial discussions. The district court believed the circumstances of this case-a rapidly-planned and executed search for a missing person believed to possibly be alive-were atypical and that there would be no chill on the relationship between defense counsel and the Government in future cases. Ultimately, the district court ruled the Littlejohn statements inadmissible at both the guilt and penalty phases of Basham's trial.

B. Legal Analysis

1.

On appeal, Basham argues vehemently that the district court abused its discretion in disqualifying his attorneys. In *Wheat,* the Supreme Court established the general rule that "the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated

before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Wheat,* 486 U.S. at 163, 108 S. Ct. 1692. In response to concerns that the Government may attempt to "manufacture" conflicts of interest to remove able counsel, the Court responded, "trial courts are undoubtedly aware of this possibility, and must take it into consideration along with all of the other factors which inform this sort of decision." *Id.* Thus, while recognizing "a presumption in favor of petitioner's counsel of choice," the *Wheat* Court found that such a "presumption may be overcome not only by a demonstration of actual conflict but by a showing of a *serious potential for conflict.*" *Id.* at 164, 108 S. Ct. 1692 (emphasis added). And, "[t]he evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court." *Id.* A district court is free to disqualify counsel even if the defendant is willing to waive a conflict of interest because of the judiciary's "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* at 160, 108 S. Ct. 1692.

Following *Wheat,* we have upheld a district court's decision to disqualify counsel who had previously represented a witness at his current client's trial, *United States v. Williams,* 81 F.3d 1321, 1324-25 (4th Cir. 1996), and reversed for abuse of discretion a district court's *failure* to disqualify counsel who had represented the prosecution's "star

witness" in a prior trial, *Hoffman v. Leeke,* 903 F.2d 280, 288-90 (4th Cir. 1990). We have made clear that a district court "must have sufficiently broad discretion to rule without fear that it is setting itself up for reversal on appeal" if it disqualifies counsel. *Williams,* 81 F.3d at 1324. And, "a district court has an obligation to foresee problems over representation that might arise at trial and head them off beforehand." *United States v. Howard,* 115 F.3d 1151, 1155 (4th Cir. 1997).

2.

On balance, we cannot say that the district court abused its discretion in disqualifying Littlejohn and Monckton. Basham focuses on the fact that the district court later found the statements inadmissible, but that perspective overlooks a district court's ability to disqualify counsel in cases where the "potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Wheat,* 486 U.S. at 163, 108 S. Ct. 1692. Although the district court eventually declined to admit the statements, there remained throughout the trial the possibility that Littlejohn could be called to testify. Moreover, if Littlejohn had remained as counsel, the potential remained that Basham could later argue that Littlejohn tried the case to avoid testifying in a way that would be prejudicial to Basham. As the district court explained:

> [O]ne could imagine a scenario in which Basham could argue that the court erred by keeping the original attorneys on the case,

> because once they knew they were in the case to stay, Littlejohn and Monckton would attempt to marshal the evidence and try the case in such a way as to ensure that their statements could not be an issue in the case. In other words, Basham could argue that his original attorneys had a vested interest in trying the case a certain way so as to minimize the possibility, however remote, that they might be called to testify.

(J.A. at 3405.) In addition, the district court was also faced with Basham's statement that he had not authorized Littlejohn to make those disclosures to the investigators.

In sum, *Wheat* and our own precedent counsel deference to the district court in this area, particularly in anticipating potential conflicts before they come to bear. The district court held hearings, invited an expert witness to testify, and carefully considered the arguments on both sides before disqualifying Littlejohn and Monckton. In such circumstances, we cannot say that it abused its discretion.

3.

An additional reason counsels against granting Basham relief on this claim. Under the Sixth Amendment, all defendants, indigent and otherwise, have the right to effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 684-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defendants with the ability to hire their own attorney also have a right to counsel of their own choosing. *See United*

States v. Gonzalez-Lopez, 548 U.S. 140, 151-52, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). In *Gonzalez-Lopez,* the Court held that a violation of the right to counsel of choice constitutes a structural error and does not require a showing of prejudice. *Id.* Basham argues that the same result follows here; we, however, have made clear that "an indigent criminal defendant has no constitutional right to have a particular lawyer represent him." *Miller v. Smith,* 115 F.3d 1136, 1143 (4th Cir. 1997). Thus, the only right implicated by the district court's disqualification of Littlejohn and Monckton was the right to effective assistance of counsel. *See United States v. Van Anh,* 523 F.3d 43, 48 n.3 (1st Cir. 2008) (holding indigent defendants have no right to counsel of their own choosing); *Daniels v. Lafler,* 501 F.3d 735, 739 (6th Cir. 2007), *cert. denied,* ___ U.S. ___, 128 S. Ct. 1654, 170 L. Ed. 2d 361 (2008) (same). As the Supreme Court noted, albeit in dicta, "those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts." *Caplin & Drysdale v. United States,* 491 U.S. 617, 624, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989).

In *Daniels,* the Sixth Circuit addressed a similar argument and concluded that no Sixth Amendment violation occurred when, over objection, the trial judge removed a defendant's appointed counsel. The court surmised, "[t]he replacement of court-appointed counsel might violate a defendant's Sixth Amendment right to adequate representation ... if the replacement prejudices the defendant-*c.g.,* if a

court replaced a defendant's lawyer hours before trial or arbitrarily removed a skilled lawyer and replaced him with an unskilled one." *Daniels,* 501 F.3d at 740.

In this case, Littlejohn and Monckton were removed during the "infancy" of the proceeding (J.A. at 3403)—there were another sixteen months until jury selection began-and Basham's replacement counsel was Jack Swerling and Gregory Harris, two extremely experienced members of the South Carolina defense bar. Swerling, in particular, is well-known for his representation in homicide and death penalty cases. *See, e.g., Sims v. Brown,* 425 F.3d 560, 582 n.14 (9th Cir. 2005) (noting Swerling's experience at the time included 100 homicide cases, four of which involved the death penalty). Basham does little to argue that this substitution was prejudicial, merely noting that Littlejohn and Monckton had filed a competency motion, which Swerling later withdrew, indicating that those attorneys were pursuing a different strategy than the one Swerling and Harris ultimately implemented. This sort of speculation, we believe, cannot meet the burden of showing prejudice.

In sum, Basham, as an indigent defendant, had the right to effective assistance of counsel, but not to counsel of his own choosing. He thus must point to some type of prejudice suffered because of the removal of Littlejohn and Monckton which, given the time of their removal and the replacement counsel Basham received, we do not believe he can do. Accordingly, the district court did not commit

reversible error in disqualifying Littlejohn and Monckton prior to trial.

IV. Guilt Phase Evidence

Next, Basham contends that the district court committed reversible error in admitting certain evidence during the guilt phase. In particular, Basham argues that four categories of evidence were not admissible under Federal Rule of Evidence 404(b) and 403: (1) evidence of his drug and alcohol use and consensual sexual relationships during the crime spree; (2) evidence regarding statements Basham made threatening to kill a drug dealer, several teenagers, and two police officers; (3) evidence of Fulks's 130-mile-per hour police chase, which occurred after Basham was captured; and (4) evidence of Burns's carjacking and the attempted carjacking of Deanna Francis and her daughter.

We review evidentiary rulings of the district court for abuse of discretion.[11] *United States v. Delfino*, 510 F.3d 468, 470 (4th Cir. 2007), *cert. denied*, ___ U.S. ___, 129 S. Ct. 41, 172 L. Ed. 2d 20 (2008). An error of law is, by definition, an abuse of discretion. *United States v. Singh*, 518 F.3d 236, 251 (4th Cir.

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[11] The Government contends that, except for the threats against the police officers, Basham failed to preserve an objection to this evidence. Because we conclude that Basham is not entitled to relief under an abuse of discretion standard, we do not address the Government's argument that Basham must meet the more onerous plain error standard. *See, e.g., United States v. Olano*, 507 U.S. 725, 732-34, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (noting defendant's increased burden under the plain error standard); *United States v. Hughes*, 401 F.3d 540, 547-48 (4th Cir. 2005) (same).

2008). We will not " 'vacate a conviction unless we find that the district court judge acted arbitrarily or irrationally' in admitting evidence." *United States v. Benkahla,* 530 F.3d 300, 309 (4th Cir. 2008) (quoting *United States v. Ham,* 998 F.2d 1247, 1252 (4th Cir. 1993)).

Under Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). Such evidence, however, may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Furthermore, "to be admissible under Rule 404(b), evidence must be (1) relevant to an issue other than character; (2) necessary; and (3) reliable." *United States v. Siegel,* 536 F.3d 306, 317 (4th Cir. 2008), *cert. denied,* ___ U.S. ___, 129 S. Ct. 770, 172 L. Ed. 2d 760 (2008) (internal quotation marks omitted). Rule 404(b) is "an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition." *United States v. Young,* 248 F.3d 260, 271-72 (4th Cir. 2001) (internal quotation marks omitted). And, "[a]s a rule of inclusion, the rule's list is not exhaustive." *United States v. Queen,* 132 F.3d 991, 994-95 (4th Cir. 1997).

The Rule 404(b) inquiry, however, applies only to evidence of other acts that are "extrinsic to the one charged." *United States v. Chin,* 83 F.3d 83, 87 (4th Cir. 1996). "[A]cts intrinsic to the alleged crime do not fall under Rule 404(b)'s limitations on admissible evidence." *Id.* at 87-88. Evidence of uncharged

conduct is not 'other crimes' evidence subject to Rule 404 if the uncharged conduct 'arose out of the same series of transactions as the charged offense, or if [evidence of the uncharged conduct] is necessary to complete the story of the crime on trial.'" *Siegel,* 536 F.3d at 316 (quoting *United States v. Kennedy,* 32 F.3d 876, 885 (4th Cir. 1994)). *See also Chin,* 83 F.3d at 88 (noting "[o]ther criminal acts are intrinsic when they are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged" (internal quotation marks omitted)). Evidence is intrinsic if it is necessary to "provide context relevant to the criminal charges." *United States v. Cooper,* 482 F.3d 658, 663 (4th Cir. 2007).

Rule 403 provides a more limited bar to otherwise admissible evidence:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

"Evidence sought to be admitted under Rule 404(b) must also satisfy Rule 403's requirement." *Siegel,* 536 F.3d at 319. Under this rule, "damage to a defendant's case is not a basis for excluding probative evidence," because "[e]vidence that is highly probative invariably will be prejudicial to the defense." *United States v. Grimmond,* 137 F.3d 823,

833 (4th Cir. 1998); *see also* 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 404.21(3)(b) (Joseph M. McLaughlin, ed., 2d. Ed. 2002) (noting "[u]nfair prejudice under Rule 403 does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence"). Rule 403 "only requires suppression of evidence that results in unfair prejudice-prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion, and only when that unfair prejudice *substantially* outweighs the probative value of the evidence." *United States v. Mohr,* 318 F.3d 613, 619-20 (4th Cir. 2003) (internal quotation marks omitted). Unfair prejudice "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States,* 519 U.S. 172, 180, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

With this legal framework in place, we turn to each category of evidence contested by Basham.[12]

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[12] Basham raised an additional argument relating to the district court's evidentiary rulings: that the Government failed to provide proper notice of its intent to use Rule 404(b) evidence. Rule 404(b) requires "reasonable notice in advance of trial ... of the general nature of any [Rule 404(b)] evidence [the government] intends to introduce at trial." Fed. R. Evid. 404(b). This argument fails because the record illustrates that Basham had sufficient notice of all of this bad acts evidence. *See United States v. Erickson,* 75 F.3d 470, 478 (9th Cir. 1996) (finding no error under Rule 404(b) notice requirement where record showed defendant had actual sufficient notice). For instance, Basham objected to admission of the threats against the police

A. Basham's Drug and Alcohol Use and Sexual Relationships

During its case-in-chief, the Government put forth evidence that, during their escape, Basham and Fulks frequently used drugs and alcohol, and that Basham had consensual sex with Roddy and McGuffin. No evidence was proffered, however, that Basham raped either victim-Samantha Burns or Alice Donovan.

We do not believe that the district court abused its discretion in admitting the evidence of Basham's relationship with McGuffin under either Rule 404(b) or 403. "Rule 404(b) does not bar evidence that completes the story of the crime or explains the relationship of parties or the circumstances surrounding a particular event." *United States v. Edwards,* 159 F.3d 1117, 1129 (8th Cir. 1998). The evidence of Basham's relationship with McGuffin served exactly that purpose-in particular, that relationship puts into context Basham's decision to give Burns's ring to McGuffin and to write inculpatory letters to her from prison.

As for evidence of Basham's relationship with Roddy and his drug use, any abuse of discretion in admitting that evidence was harmless. *See* Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must

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officers and the teenagers before the Government even reached that line of questioning with Tina Severance. *See* J.A. at 775 (introducing the objection by noting, "[o]ne other issue ... I thought this may be the appropriate time to do it ... although it will be some distance away").

be disregarded."); Fed. R. Evid. 103(a) (noting evidentiary errors support reversal only if they affect "substantial right"). Erroneously admitted evidence is harmless if a reviewing court is able to "say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Kotteakos v. United States,* 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946); *United States v. Brooks,* 111 F.3d 365, 371 (4th Cir. 1997).

While "it was detrimental to the defendants for the jury to view them as drug [users]," *United States v. Brooks,* 125 F.3d 484, 500 (7th Cir 1997), we remain cognizant that Basham was charged with heinous actions during a crime spree following his escape from prison. Evidence that Basham used drugs and had consensual sex with Roddy was unlikely to substantially sway the jury in this case. The Government presented an overwhelming case against Basham during the guilt phase; the carjacking and kidnapping were recorded by a security camera, and Basham's counsel, during opening statement, summarized Basham's situation succinctly: "Based on what I told you, it should be fairly apparent at this point that we will, more than likely, with all probability, have a second trial in this case. We will, more than likely, proceed into that sentencing phase." (J.A. at 531.) While an attorney's statements are not evidence, they paint a fair picture of the evidence against Basham in this case.

In addition, Basham actually used some of this evidence to his advantage. For instance, during the guilt phase, Basham focused on his lack of specific intent to kill Alice Donovan or cause her serious bodily harm. To that end, Basham repeatedly contended that Fulks was the leader during the crime spree, the driving force behind the violence. As Basham's counsel explained during closing argument, "[Fulks] was the one buying the drugs, doling out the money ... bringing drugs back, and telling everybody how much they could have." (J.A. at 1746.) The admission of this evidence was harmless to Basham.

B. Basham's Threats of Violence

Next, Basham objects to the admission of his statements in the hotel room in Sturgis, Michigan, that he was prepared to kill the two police officers who were knocking on hotel room doors, his statements that he was going to rob and kill the group of teenagers at the mall there because they had money, and a statement he made to McGuffin that he was going to kill her brother, who was selling drugs to Fulks. The Government contends, and we agree, that these statements were admissible under Rule 404(b)'s "other purposes" trigger, that is, that they were relevant to Basham's intent.

Basham's specific intent to kill Donovan or cause her serious harm was the crucial issue at trial;[13]

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[13] Indeed, during the deliberations the jury actually asked the district court for a definition of intent, (J.A. at 1765-67), further suggesting that Basham's guilt turned on this element of the offense.

Basham admitted to carjacking and kidnapping Donovan during his opening statement and contended only that he lacked that specific intent. Statements made after Basham's escape that he was willing to kill, without Fulks present, are thus clearly relevant to show Basham was capable of having the specific intent to do harm. *See United States v. Higgs,* 353 F.3d 281, 312 (4th Cir. 2003) (death threats admissible to prove motive and intent); *United States v. Abraham,* 386 F.3d 1033, 1035 (11th Cir. 2004) (prior threats of violence admissible to prove motive, intent, or lack of mistake). For these same reasons, the district court did not abuse its discretion in declining to exclude these statements under Rule 403 because, although undoubtedly prejudicial, they were highly probative of Basham's ability to form the specific intent to cause serious harm.

C. Fulks's High Speed Police Chase

Count 4 alleged a conspiracy between Basham and Fulks to, among other aims, transport stolen cars in interstate commerce. Overt acts 19 and 20 related to Fulks's efforts to hide Donovan's BMW at his brother's home in Indiana following Basham's capture. Evidence of Fulks's flight through the state of Ohio was thus arguably intrinsic to proving this conspiracy and those particular overt acts. Even intrinsic evidence, however, must also satisfy Rule 403's balancing test, *Grimmond,* 137 F.3d at 832, and, as Basham notes, the Government introduced this evidence via videotape of the chase itself.

Admission of this evidence, even if erroneous, however, was harmless. The tape represented a minor portion of the Government's lengthy presentation and showed Fulks's recklessness and desire to avoid capture, not Basham's. The Government presented overwhelming evidence of Basham's guilt, and we can confidently state that admission of this tape did not substantially sway the jury's verdict.

D. The Burns Carjacking and Francis Attempted Carjacking

Basham's fourth contention is that the district court permissibly admitted (1) evidence that Basham and Fulks carjacked, kidnapped, and murdered Burns, and (2) evidence that Basham attempted to carjack Deanna Francis and her daughter, but that the district court impermissibly let the Government use this evidence in its closing argument not to prove intent under Rule 404(b), but to prove propensity. Basham did not object to the Government's closing argument, so our review is for plain error. *United States v. Fields,* 483 F.3d 313, 340 (5th Cir. 2007), *cert. denied,* ___ U.S. ___, 128 S. Ct. 1065, 169 L. Ed. 2d 814 (2008). Under plain error review, Basham must show that (1) the district court committed an error; (2) the error was plain; and (3) the error affected his substantial rights. *United States v. Olano,* 507 U.S. 725, 732-34, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); *United States v. Hughes,* 401 F.3d 540, 547-48 (4th Cir. 2005). Even if Basham makes this showing, we notice the error only if it "seriously affects the fairness, integrity or public reputation of

judicial proceedings." *Hughes,* 401 F.3d at 555 (internal quotation marks and citation omitted).

We find no error, let alone plain error, on this claim. The Government referred to both incidents in its closing arguments during a list of incidents showing that Basham possessed "intent to harm, and threat[en], and cause serious bodily harm and death." (J.A. at 1728-29.) It discussed the Burns and Francis incidents as follows:

> What evidence do you have? Ladies and gentlemen, you have got Alice Donovan sandwiched in between Samantha Burns and Andrea Francis. Similarities are unbelievable. You got Brandon Basham participating, going to a mall just like with Alice Donovan, with Samantha Burns, abducting a lone female, killing her, and disposing of her body three days before Alice Donovan. And three days after Alice Donovan, you got Brandon Basham going to a mall, picking out an isolated female and trying to carjack and kidnap her. So, three days before and three days after Alice Donovan, you got Brandon Basham acting with the same, similar intent with the same, similar motivation. Samantha Burns is dead. Andrea Francis, they weren't able to get her.

(J.A. at 1728.)

Basham takes isolated statements from this argument to suggest that the Government was contending that Basham should be found guilty of killing Donovan because he murdered Samantha Burns and attempted to carjack the Francis family.

Such an argument, Basham notes, would be forbidden by Rule 404(b)'s admonition that other act evidence is not usable "to prove the character of a person to prove conformity there with." Fed.R.Evid. 404(b). A full examination of this closing argument, however, reveals that the Government tied this evidence entirely to a discussion of Basham's intent. Accordingly, there was no error, let alone plain error, in allowing the Government's closing argument on this point.

E. Cumulative Error

Basham's final contention is that, even if the improperly admitted evidence, when viewed individually, is harmless, that result changes when the evidence is viewed cumulatively. Pursuant to the cumulative error doctrine, "[t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *United States v. Rivera,* 900 F.2d 1462, 1469 (10th Cir. 1990) *cited with approval in United States v. Martinez,* 277 F.3d 517, 532 (4th Cir. 2002). Generally, however, if a court "determine[s] ... that none of [a defendant's] claims warrant reversal individually," it will "decline to employ the unusual remedy of reversing for cumulative error." *Fields,* 483 F.3d at 362. To satisfy this requirement, such errors must "so fatally infect the trial that they violated the trial's fundamental fairness." *United States v. Bell,* 367 F.3d 452, 471 (5th Cir. 2004). When "none of [the] individual rulings work[ ] any cognizable harm, ... [i]t necessarily follows that the

cumulative error doctrine finds no foothold." *Sampson,* 486 F.3d at 51.

In the instant case, given the overwhelming evidence against Basham, and the fact that neither the admission of Basham's drug use nor the admission of Fulks's car chase "individual[ly] work[ ] any cognizable harm" and were mere blips in a presentation that included eighty-nine witnesses and countless exhibits, we have little difficulty concluding that cumulatively there is no error. *Id.*

V. Penalty Phase Evidence

Basham next raises several contentions regarding the admissibility of certain evidence during the penalty phase of the trial. In particular, Basham contends that the district court should not have admitted: (1) evidence of his behavior toward female prison employees; (2) evidence of a scuffle in the courtroom between him and the United States Marshals; and (3) the trial record itself. Basham also contends that the district court should have admitted as evidence that, in Fulks's trial, the Government referred to Basham as Fulks's "puppet." Basham failed to raise a timely objection to the latter two rulings.

We review evidentiary rulings for abuse of discretion. *Delfino,* 510 F.3d at 470. We have held that this standard of review is equally applicable to evidentiary rulings made at the penalty phase. *Fulks,* 454 F.3d at 434. By statute, however, at the penalty phase, if evidence was erroneously admitted, reversal is mandated unless the Government can show beyond a reasonable doubt that the error was

harmless. *United States v. Barnette*, 211 F.3d 803, 824 (4th Cir. 2000); 18 U.S.C.A. § 3595(c)(2)(C) (noting, for "any other legal error requiring reversal ... that was properly preserved ... [t]he court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless"). Basham's unpreserved claims are reviewed for plain error.

In federal capital sentencing hearings, the Federal Rules of Evidence do not apply. Instead, 18 U.S.C.A. § 3593(c) (West 2000 & Supp. 2008) provides:

> Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.

18 U.S.C.A. § 3593(c).

That section also provides that the Government "may present any information relevant to an aggravating factor for which notice has been provided" and that a defendant "may present any information relevant to a mitigating factor." *Id.* Moreover, "[i]nformation presented may include the trial transcript and exhibits if the hearing is held by a jury or judge not present during the trial, or at the trial judge's discretion." *Id.* Courts have noted that the FDPA "erects very low barriers" of admissibility given that "the need to regulate the scope of testimony is less at the penalty phase than at the

guilt phase." *United States v. Lee*, 274 F.3d 485, 494 (8th Cir. 2001). With this statutory framework in place, we turn to each of Basham's claims.

A. Basham's Behavior Toward Female Prison Employees

The Government's death notice against Basham listed "future dangerousness" as a non-statutory aggravating circumstance. Future dangerousness is best defined as evidence that a defendant is "likely to commit criminal acts of violence in the future that would be a threat to the lives and safety of others." *United States v. Bernard*, 299 F.3d 467, 482 (5th Cir. 2002). The Supreme Court has recognized future dangerousness as a legitimate aggravating factor in capital proceedings. *Simmons v. South Carolina*, 512 U.S. 154, 162-63, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994). At the penalty phase, the Government sought to introduce evidence that Basham's behavior in correctional facilities and his behavior toward female prison employees indicated a failure to adapt to societal norms and suggested his future dangerousness towards inmates and correctional employees. To that end, during the penalty phase, the Government introduced evidence that Basham, while imprisoned prior to trial, hoarded medicine, fought with guards, broke prison rules, and brought in contraband. Basham did not object to this evidence.

The Government next entered testimony, over Basham's objection, that Basham exposed himself and masturbated in front of female nurses delivering medicine. Likewise, a male guard testified that,

when, at the nurses' request, he confronted Basham regarding the behavior, Basham smiled and said he was just playing around with the women. The experiences of one particular nurse, Jennifer Miosi, are representative. Nurse Miosi testified that, on one occasion, Basham masturbated when Miosi was speaking with him, ignored requests to stop, and ejaculated in her direction. On other occasions, Basham asked her to stay and watch him finish masturbating. He once stuck his erect penis and genitals through the food slot of his cell and ejaculated at her. He also threatened to sodomize her during an incident involving a telephone. Basham had been given a headset to make a phone call from his cell but refused to give it back and began threatening the staff that he was going to "use it to bash people's heads in." (J.A. at 2036.) Nurse Miosi attempted to de-escalate the situation, to which Basham responded by threatening her, "I am going to f* *k you up the a* *, Ms. Miosi. I am going to kill you, psych b* * *h." (J.A. at 2038.)

We do not believe the district court abused its discretion in admitting this evidence. First, under § 3593(c), the Government may introduce "any information relevant to an aggravating factor for which notice has been provided." This evidence is clearly "relevant" to the future dangerousness aggravator. Relevance "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. "[R]elevance typically presents a low barrier to admissibility."

United States v. Leftenant, 341 F.3d 338, 346 (4th Cir. 2003). Thus, evidence is relevant if it is "worth consideration by the jury" or has a "plus value." *Queen,* 132 F.3d at 998 (internal quotation marks omitted). Evidence that Basham, while a prisoner, engaged in sexually aggressive and threatening behavior towards female employees clears that minimal hurdle as to his future dangerousness. *See, e.g., United States v. LeCroy,* 441 F.3d 914, 930 (11th Cir. 2006) (concluding that evidence of prior crimes was "clearly probative" to defendant's future dangerousness); *Bernard,* 299 F.3d at 482 (concluding that evidence of propensity for violence in prison permitted finding of future dangerousness); *Lee,* 274 F.3d at 494 (holding that evidence defendant abused a girlfriend, assaulted his sister, and assaulted patients and inmates at facilities probative of future dangerousness).

Second, we do not believe the district court abused its discretion in concluding that the probative value of the evidence was not outweighed by the risk of unfair prejudice. We do appreciate the fact that the female employees were not particularly concerned by Basham's display; for instance, one nurse testified that she chose not to report Basham for his behavior, and Nurse Miosi testified she "didn't feel as though [she] was in danger of him trying to grab ... or hit ... [her] hands" during the foot slot incident (J.A. at 2031), and that "the thing is, I can walk away from his cell. He can't follow me." (J.A. at 2050.) This testimony in and of itself, however, would seem to eliminate much of the concern of unfair prejudice Basham raises. Moreover, given the

heinousness of the acts committed by Basham during his escape, we find it unlikely that this evidence would particularly inflame the jury. *See Lee,* 274 F.3d at 494 (finding unfair prejudice did not outweigh probative value of future dangerousness evidence because "none of the evidence elicited ... was likely to inflame the jury as much as testimony about [the defendant's] involvement in the murder"). Indeed, Basham's counsel, during the guilt phase, noted that the criminal acts committed by Basham were "despicable" and would "shock" the jury. (J.A. at 524, 523.)

Basham contends, however, that the risk of unfair prejudice from the evidence regarding his sexually threatening behavior was elevated because the Government had posited that Fulks-but not Basham-raped Donovan prior to her death. Thus, argues Basham, evidence of his sexually inappropriate behavior toward the female prison employees might have led the jury to associate him with those rapes as well. We disagree; any such minimal risk is offset by the highly probative nature of this evidence and the fact that this evidence was no more likely to inflame the jury than the testimony of the heinous acts committed by Basham in November 2002.

B. The Courtroom Scuffle

During the guilt phase of the trial, it came to the district court's attention that Basham was having trouble staying awake in court. Basham informed the court that he was unable to stay awake by the afternoon because he was emotionally exhausted and

stressed out; he then became emotional, saying he simply wanted to sign the death warrant and be executed. As a less drastic measure, the district court agreed to let Basham, in exchange for staying awake, use chewing tobacco in court.

The following Monday, the district court withdrew this promise on the advice of the United States Marshal. The Marshal informed the court that Basham had a history of flinging fluids-bodily and otherwise-at correctional officers, and the Marshal was concerned about what Basham might do with the spit created by chewing tobacco. As a compromise, the district court offered Basham nicotine gum and Mountain Dew, or a similarly caffeinated beverage. Later, outside the presence of the jury, the district court addressed a report that Basham had told another marshal that he did not actually care about having the chewing tobacco, but that he just wanted to make U.S. Deputy Marshal Riley, an African-American, mad. During this discussion, Basham became agitated and asked to go downstairs to a holding cell to watch the proceedings. After the district court informed Basham that would not be possible because Basham's counsel had previously indicated opposition to him leaving the courtroom, Basham refused to comply with the district court's instruction to take his seat. Marshals approached Basham to assist him to his seat, prompting Basham to say, "Let me go, like I said. You mother f* * *ers." (J.A. at 1156.) The trial transcript continues, "[w]hereupon a tussle ensued in the courtroom between the defendant and the marshals." (J.A. at 1156.)

Basham kept a running commentary during the "tussle," swearing at the marshals, saying "[t]he f* * *ing judge lied to me," (J.A. at 1157), claiming that he never said anything to Deputy Marshal Riley, and that "It is all because that Riley is black. It is racism is all it was." (J.A. at 1158.) Basham then noted, "And another thing. You talking about spitting. If I was going to spit, I would be spitting now." (J.A. at 1158.)

Once the situation was controlled, Basham was sent downstairs to the holding cell. The trial was adjourned for that afternoon. Thereafter, the district court permitted Basham to have dip during breaks, and Basham behaved himself. During the penalty phase, over Basham's objection, the Government moved to introduce the transcript and videotape of the scuffle. The district court obliged, but removed all references to himself (i.e. the threat "the f* * *ing judge lied") and to Basham's beliefs that the confrontation was spurred by racism. The district court was concerned that putting those details before the jury could cause it to punish Basham for threatening the judge or being racially insensitive instead of for the crimes charged.

Again, like the evidence of Basham's sexual misconduct towards the female prison employees, this evidence was clearly relevant to Basham's future dangerousness-it proved his confrontational nature toward authority figures, particularly prison officials. It was also probative as rebuttal to one of Basham's principal mitigation arguments-that Basham suffered from various mental defects limiting his culpability. Basham's actions and

manipulation during the episode (saying he would have spit during the fight if he was someone who did spit), coupled with the fact that he remained calm during the remainder of the trial once he was permitted to have his chewing tobacco during breaks, point to a manipulative individual.

Moreover, the district court substantially diminished any risk of unfair prejudice by excising Basham's comments about racism and the district court. In these circumstances, we cannot say the district court abused its discretion in admitting this evidence.

C. The Trial Transcript

Basham failed to raise a contemporaneous objection to the admission of the trial transcript during the penalty phase.[14] Accordingly, we review this claim for plain error. *Chin,* 83 F.3d at 87. Under plain error review, Basham must show that (1) the district court committed an error; (2) the error was plain; and (3) the error affected his substantial rights, i.e., that the error affected the outcome of the penalty phase. *Olano,* 507 U.S. at 732-34, 113 S. Ct. 1770; *Hughes,* 401 F.3d at 547-48. Even if Basham makes this showing, we notice the error only if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Hughes,* 401 F.3d at 555 (internal quotation marks and citation omitted).

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[14] Basham contends that he did raise such an objection, but a review of the record shows that Basham simply asked the district court to include all of his objections to trial testimony in admitting the record.

Section 3593(c) provides that "[i]nformation" during the penalty phase "may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion." 18 U.S.C.A. § 3593(c). Thus, the language of the FDPA clearly rests the decision to admit the trial record firmly in the district court's discretion. Common sense would dictate that, given that the same jury is presumed to hear both the guilt and penalty phases, *see* 18 U.S.C.A. § 3593(b), the trial record is almost always going to be considered during the penalty phase. *Cf. United States v. Ortiz,* 315 F.3d 873, 902 (8th Cir. 2002) (noting "the government permissibly relied on evidence introduced at trial" to prove an aggravating factor during the guilt phase).

Section 3593(c), however, sets forth a different evidentiary standard than the Federal Rules of Evidence provide at trial. Thus, "a court has two separate sets of responsibilities with respect to evidence that a single jury may consider twice, once when deciding between guilt and acquittal, the other when deciding between life and death." *United States v. Pepin,* 514 F.3d 193, 207 (2d Cir. 2008). To that end, courts have found reversible error when a district court applies the Federal Rules of Evidence to keep evidence out during the penalty phase. *Lee,* 274 F.3d at 495. Such a rule does not, however, suggest that the FDPA's evidentiary rules operate to keep out a great deal of relevant evidence. Instead, the Supreme Court itself recognized it is "desirable for the jury to have as much information before it as possible when it makes the sentencing decision."

Gregg v. Georgia, 428 U.S. 153, 204, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

In this case, we do not believe that the district court committed plain error in admitting the trial record. Basham's main objection is to the admission of the evidence of Basham's drug use and sexual encounters during the crime spree; however this evidence was highly probative of several of the Government's aggravating factors, namely, Basham's intent in killing Donovan, his lack of remorse, *see Ortiz,* 315 F.3d at 902 (evidence that defendant went drinking after being paid for murder-for-hire showed lack of remorse); *Jackson v. Johnson,* 194 F.3d 641, 652 (5th Cir. 1999) (finding that evidence that defendant played pool and drank beer was relevant to show a lack of remorse), and his future dangerousness. And, given that the jury had already heard all of this evidence, it is somewhat difficult to understand how prejudicial its admission in the form of the trial record could be.[15]

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[15] For similar reasons, we also reject Basham's related contention that, even if the record was properly admitted, the Government impermissibly used the testimony regarding Basham's drug use and sexual encounters during closing arguments and elsewhere as propensity evidence. To the extent the Government did make such arguments during the closing argument, there was no plain error because that evidence was relevant to aggravating factors. Moreover, the district court properly instructed the jury that closing arguments were not evidence, (J.A. at 1908), and we presume the jury follows instructions, *Jones v. United States,* 527 U.S. 373, 394, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999) ("The jurors are presumed to have followed ... [the] instructions.").

D. Inconsistent Statements During Fulks's Trial

Finally, Basham argues that the district court should have admitted statements made by the Government during Fulks's trial that suggested Basham was merely Fulks's "puppet" during their crime spree. Basham concedes that he did not raise this claim below. A review of the record, however, convinces us that plain error review is not even available on this claim.

Prior to trial, Basham moved to enter as evidence at the penalty phase the Government's statements in Fulks's case about Basham's role in the offense. The district court stated that it would defer ruling on the motion until the Government presented its case in chief. Basham's attorney responded "that works for us" (J.A. at 511), but thereafter never moved for admission of those statements. By failing to request that the district court rule on the admissibility of that evidence, Basham has waived this argument. *See United States v. Jackson,* 346 F.3d 22, 24 (2d Cir. 2003) ("Where ... a claim has been waived through explicit abandonment, rather than forfeited through failure to object, plain error review is not available."). It would be difficult to see how the district court committed plain error when it never even issued a ruling to be found in error.[16]

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[16] Basham also contends that the cumulative error doctrine applies to these claims. Because we conclude that the district court did not commit error in its evidentiary rulings during the penalty phase, it follows *a fortiori* that there was no cumulative error.

VI. Jury Instructions

We review de *novo* the question of whether a mitigator was properly submitted to the jury during the penalty phase. *Higgs,* 353 F.3d at 328. Under 18 U.S.C.A. § 3592(a), "[i]n determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor." Section 3592(a)(1-7) lists seven particular mitigating factors; subsection (a)(8) is a catchall, which permits the jury to find, as a mitigating factor, "[o]ther factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence." 18 U.S.C.A. § 3592(a)(8).

Prior to issuing the jury instructions during the penalty phase in this case, the district court announced, over Basham's objection, that it would issue an instruction on § (a)(8) but would not include it on the special verdict form because of its "catchall" nature. (J.A. at 2738-41.) In its actual instructions, the district court informed the jury that Basham raised six statutory mitigating factors:

> Number Six, any other factors in Brandon Leon Basham's background, record, or character, or any other circumstance of the offense that mitigates it against the imposition of the death sentence.

(J.A. at 2751.)

In its final discussion of mitigating factors, the district court reiterated:

> Unlike aggravating factors, the law does not limit your consideration of mitigating factors to those that are listed for you; therefore, if there are any mitigating factors not listed in these instructions, but which any juror finds to be established by a preponderance of the evidence, that juror is free to consider them in his or her sentencing decision.

(J.A. at 2755.)

Later during the instructions, the district court instructed the jury on the special verdict form:

> I have prepared a form entitled 'Special Verdict Form' to assist you during deliberations. You are required to record your decisions on this form ... it will be necessary for you to record the number of jurors, if any, who found each mitigating factor. For a jury's determination to be tallied on the verdict form in this fashion requires that the juror individually go through the two-step process.

(J.A. at 2760-61, 2749)

The district court reiterated, "on the special verdict form in Section 5, you should report the total number of jurors who found that any particular factor was established by a preponderance of the evidence, and that the factor was also mitigating." (J.A. at 2750.) As mentioned, however, while the district court instructed that the jury could consider any "other factors," (J.A. at 2751), there was no space on the special verdict form to record any such factor. The district court, however, clearly explained this omission to the jury:

> [W]hen I was going through these statutory mitigating factors, I listed six. The sixth was kind of a catchall factor that is not listed on this verdict form. The sixth one that I read to you said, any other factors in Brandon Basham's background, record, character, or any other circumstance of the offense that mitigates the sentence of life against the imposition of the death sentence. Since that is overall, I have not listed it on the finding form because it would be impossible to list an infinite number of mitigating factors. But I want to remind you that you are not limited to this list of mitigating factors. If any individual juror can think of a factor that is mitigating that has been proven in this case, you may consider that factor in the weighing process, regardless of whether it is in this list or not, and regardless of whether any other juror found that mitigating factor to exist.

(J.A. at 2769.)

The Eighth Amendment requires that the jury "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (plurality). That is, "the jury [must] be able to 'consider and give effect to [a defendant's mitigating] evidence in imposing sentence.'" *Penry v. Johnson,* 532 U.S. 782, 797, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001) (" *Penry II* ") (quoting *Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S.

Ct. 2934, 106 L. Ed. 2d 256 (1989) ("*Penry I*"), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)). Only if this standard is met can a court be sure that the jury "has treated the defendant as a uniquely individual human bein[g] and has made a reliable determination that death is the appropriate sentence." *Penry I*, 492 U.S. at 319, 109 S. Ct. 2934 (internal quotation marks omitted).

"Neither the FDPA nor [the Constitution] require a capital jury to give mitigating effect or weight to any particular evidence." *United States v. Paul*, 217 F.3d 989, 999 (8th Cir. 2000); *see also Higgs*, 353 F.3d at 327 (noting that "the Constitution only requires that the jury be allowed to *consider* evidence that is proffered as mitigating ... [t]here is no constitutional requirement that the jury find a mitigating factor"). Thus, "[t]here is only a constitutional violation if there exists a reasonable likelihood that the jurors believed themselves precluded from considering relevant mitigating evidence." *Id. See Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990) (setting forth "reasonable likelihood" test). A jury need only "be able to consider in some manner all of a defendant's relevant mitigating evidence," and need not "be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Johnson v. Texas*, 509 U.S. 350, 372, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993). The government's capital sentencing procedures "may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury

from giving effect to any relevant mitigating evidence." *Buchanan v. Angelone,* 522 U.S. 269, 276, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998).

Basham contends that, although the district court's oral jury instruction may have properly informed the jurors that they could consider any "other factors" in mitigation, the absence of such a mitigator from the special verdict form created a reasonable likelihood that jurors, in fact, believed they were precluded from considering "other factors" in mitigation.

We disagree.[17] In *Jones v. United States,* 527 U.S. 373, 393, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999), the Court rejected a similar argument, concluding that a district court's "explicit instruction" could overcome any ambiguity or confusion caused by a verdict form. Likewise, in this case the district court explicitly instructed that "other factors" (J.A. at 2751) could be considered as a statutory mitigator, and even summarized its mitigation instruction to reiterate that "any mitigating factors," even those unmentioned by the parties or absent from the special verdict form, could be considered by a juror. (J.A. at 2755.)

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[17] We also note that at least two courts have held-under the FDPA-that jurors do not have to be permitted to even record mitigating factors on a special verdict form. *United States v. Paul,* 217 F.3d 989, 999 n. 6 (8th Cir. 2000); *United States v. Hall,* 152 F.3d 381, 413 (5th Cir. 1998) *abrogated on other grounds by United States v. Martinez-Salazar,* 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000).

Basham primarily relies upon the Court's decision in *Mills v. Maryland,* 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). In *Mills,* the state trial judge issued an instruction that, when read in conjunction with the verdict form, arguably required the jury to find mitigating circumstances unanimously before they could be considered in determining if a death sentence was appropriate. The Court set aside the death sentence, finding a "substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Id.* at 384, 108 S. Ct. 1860. We have since explained that *Mills* covers claims beyond the unanimity requirement, that is, claims that ambiguous verdict forms may create "confusion precluding the jury from considering mitigating evidence." *Burch v. Corcoran,* 273 F.3d 577, 587 (4th Cir. 2001).

Mills is inapplicable to the present case; the district court, correctly and concisely, instructed the jury that it was free to consider any factor in mitigation, including factors not specifically raised. That was in addition to the district court's recitation of five other statutory mitigating factors and thirty non-statutory mitigating factors. And, when explaining the special verdict form, the district court reiterated, in clear language, that a juror could consider any mitigating factor it desired, even if it did not appear on the form. This case is a far cry

from *Mills,* in which the jury instructions suggested no mitigating factors could be considered unless the jury unanimously so found. Indeed, the underlying current in this line of Supreme Court precedent is confusion in the oral jury instruction itself. *See, e.g., Penry II,* 532 U.S. at 798, 121 S. Ct. 1910 (in reversing death sentence, Court noted the mitigating instruction was a "confusing instruction" that made it "logically and ethically impossible for a juror to follow both sets of instructions").

Basham's argument also runs into the "strong policy against retrials ... where the claimed error amounts to no more than speculation." *Boyde,* 494 U.S. at 380, 110 S. Ct. 1190. "[A] capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility [that the jury applied a challenged instruction in a way that prevented the consideration of mitigating evidence]." *Id.* We conclude there is no such possibility in this case, and the omission of the "other factors" mitigator from a special verdict form listing thirty-six statutory and non-statutory mitigating factors does not raise a "reasonable likelihood" that mitigating evidence was withheld from the jury.

VII. Section 3595

Section 3595 of the FDPA states that "[t]he court of appeals ... shall consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." 18 U.S.C.A. § 3595(c)(1). Accordingly, we are "obliged" to review the entire record independently even if the defendant does not raise the issue. *Fulks,* 454 F.3d at 421 n.4.

Courts, including our own, have looked at several factors in determining if a death sentence was imposed under an improper influence, such as the following: whether the jury was instructed not to rely on an arbitrary factor, *Fields,* 483 F.3d at 362 n.42, whether sufficient evidence supported the aggravating factors, *Barnette,* 211 F.3d at 820-21; *Paul,* 217 F.3d at 1006, whether the jury's verdict indicates that it considered the evidence dispassionately, *Sampson,* 486 F.3d at 51-52, and whether the trial was conducted fairly, *Fulks,* 454 F.3d at 421 n. 4. We will vacate a death sentence when an arbitrary factor "most likely" influenced the sentence. *United States v. Agofsky,* 458 F.3d 369, 373 (5th Cir. 2006); *United States v. Johnson,* 223 F.3d 665, 676 (7th Cir. 2000).

With these factors in mind, we conclude that Basham's sentence was not rendered under the influence of passion, prejudice, or another arbitrary factor. First, and most importantly, the jury's verdict indicates that it followed its instructions and weighed the evidence dispassionately: it rejected one of the Government's aggravators (future dangerousness), and at least one juror found nineteen of Basham's thirty-six statutory and non-statutory mitigators. *See Sampson,* 486 F.3d at 52 (finding no arbitrariness when "the jurors failed to find other aggravating factors ... [and] the jurors found several mitigating factors"). This verdict "suggest[s] that the jury considered the evidence in a thorough, even-handed, and dispassionate manner." *Id.*

In addition, the district court properly instructed the jury to not rely on arbitrary factors, and the Government had significant evidence supporting several of its aggravators, that: Basham was an escapee, killed Burns, committed acts of violence towards James Hawkins, Carl Jordan, and Officer Davis, and impacted Donovan's family. *See Paul,* 217 F.3d at 1005 ("In light of the substantial evidence supporting the aggravating factors found by the jury, we cannot say that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.").

Basham's chief argument on this issue is that, given the misconduct of Cynthia Wilson (the jury foreperson), it is naive to believe that this jury was capable of following instructions or weighing the evidence. Certainly, Cynthia Wilson was not a model juror in any way, shape, or form, and we applaud the district court's decision to sanction her for her behavior. But the jury's actual verdict, which is the best evidence of the jury's internal thought process, illustrates that the jury did carefully consider the evidence presented both in aggravation and mitigation of Basham's crimes. *See Paul,* 217 F.3d at 1004-05 (finding no arbitrariness when jury followed "exactly the process [it] was to complete").

Accordingly, we conclude that Basham's sentence was permissible under § 3595.

VIII. Conclusion

"[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall,* 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed.

2d 674 (1986). Brandon Basham's capital trial may not have been a perfect one, but a review of the proceedings below and the district court's cautious and thorough handling of them convinces us that he did receive a fair one. The judgment of the district court is

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

UNITED STATES OF AMERICA,	) CRIMINAL NO.
	) 4:02-992-17
v.	)
	) **ORDER No. ____**
BRANDON LEON BASHAM	) **Motion for a**
	) **New Trial**
	)

This capital murder case is before the court upon motion of the defendant, Brandon Leon Basham, for a new trial. In his motion, Mr. Basham incorporates by reference all objections and motions made during his three-month trial, but his memorandum in support of his motion does not address these issues in any detail. The motion also raises, and the memorandum extensively addresses, a new issue—that of juror misconduct. The defendant contends that this misconduct denied him a fair trial in violation of the Fifth and Sixth Amendments to the United States Constitution.

As to the issues that were raised during trial, the court reaffirms all of its earlier rulings and those issues are preserved for appellate review.

With regard to the juror misconduct issues, the court conducted a total of nine hearings, and heard extensive oral argument. For the reasons set forth

below, the court has determined that juror misconduct did, in fact, occur, but that the government has successfully rebutted the presumption of prejudice that arises from the misconduct. For this reason, the court will deny the motion for a new trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

Basham and a co-defendant, Chadrick Evan Fulks, were charged with the death of Alice Donovan, a resident of Gallivant's Ferry, South Carolina, in November 2002. Testimony at the trial showed that Basham and Fulks escaped from a county detention facility in Kentucky and thereafter engaged in a 17-day crime spree. Among other things, they forcibly kidnapped and killed Alice Donovan, a 44-year old mother of two who resided near Myrtle Beach, South Carolina. The government also presented evidence that they kidnapped and killed Samantha Burns, a 19-year old college student in West Virginia. The remains of both Ms. Burns and Ms. Donovan have never been located. The evidence showed that Ms. Donovan was transported into North Carolina prior to her demise. Because of the interstate transportation involved and because the body was never found, Basham and Fulks were charged in U.S. District Court with carjacking resulting in death (18 U.S.C. § 2119), kidnapping resulting in death (18 U.S.C. § 1201), and other federal firearms and automotive theft offenses.

On September 30, 2004, the jury found Basham guilty on all counts contained in the Superceding

Indictment.[1] The guilty verdict was followed by a month-long penalty phase trial. On November 2, 2004, the jury returned death verdicts against Basham on the two capital charges—carjacking resulting in death, 18 U.S.C. § 2119, and kidnapping resulting in death, 18 U.S.C. § 1201(a).

On November 3, 2004, the day after the penalty phase verdict, the Assistant United States Attorney ("AUSA") who prosecuted the Basham case received a voice mail message from a producer at WSPA, a television station in upstate South Carolina. The message informed the AUSA that during the trial the producer had been contacted by a woman purporting to be a juror in the Basham case.

After the AUSA spoke with the producer to gather information, he promptly informed the court and defense counsel of this development. The producer told the AUSA that a female who identified herself as a juror in the Basham case called the

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[1] Count I, 18 U.S.C. § 2119 (carjacking resulting in death) and 18 U.S.C. § 2 (aiding and abetting carjacking resulting in death); Count II, 18 U.S.C. § 1201(a)(1) (kidnapping resulting in death) and 18 U.S.C. § 2 (aiding and abetting kidnapping resulting in death); Count III, 18 U.S.C. § 2312 (interstate transportation of stolen motor vehicle) and 18 U.S.C. § 2 (aiding and abetting such transportation); Count IV, 18 U.S.C. § 371 (conspiracy); Count V, 18 U.S.C. § 924(o) (conspiracy to use and carry firearms in furtherance of crime of violence); Count VI, 18 U.S.C. § 924(c)(1)(A) (use of firearm during crime of violence) and 18 U.S.C. § 2 (aiding and abetting such use); Count VII, 18 U.S.C. §§ 922(g)(1) & 924(a)(2) (felon in possession of firearm) and 18 U.S.C. § 2 (aiding and abetting such possession); and Count VIII, 18 U.S.C. §§ 922(j) & 924(a)(2) (possession of stolen firearms) and 18 U.S.C. § 2 (aiding and abetting).

television station. During the conversation, the juror asked the producer why the station was not covering the trial. The producer advised the AUSA that the juror informed her that the jury would have a difficult time reaching a decision because there were jurors both for and against the death penalty, that Basham had acted out in the courtroom, and that there were jurors from upstate South Carolina. The producer told the caller that the station was not covering the trial because it was out of their coverage area.

The AUSA suggested sending the FBI to interview the jurors, but the defense counsel objected to this procedure. A status conference was held on November 10, 2004 at which the court decided to call in the female jurors from upstate South Carolina in an attempt to determine which one, if any, made the phone call. A hearing was scheduled for November 12, 2004.

The three female jurors who were from upstate South Carolina were subpoenaed along with Shannon Mays, the WSPA news producer who had spoken with the purported juror. The jurors were not informed of the reason of the hearing in advance. Out of an abundance of caution, the court appointed three criminal defense attorneys with extensive experience in federal court to act as standby counsel for the three jurors.

On November 12, 2004, the court held a sealed hearing[2] at which the government, defense counsel.

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[2] The court sealed the hearing and the transcripts of the hearing in an attempt to limit media exposure. The court was unsure whether

Shannon Mays, and the WPSA station's attorney, and three standby attorneys for the three jurors were present. The court first questioned and allowed counsel to question Mays about her recollection of the phone call. Mays testified that she was familiar with the case because she had worked for a news station in Indiana when the defendant originally escaped from jail. The juror allegedly told Mays that there would be "issues" during deliberations because some jurors were for the death penalty and some were against it. The juror also allegedly told the producer that Basham had acted up and had fallen asleep in court. The producer testified that she did not impart any knowledge to the juror related to the Basham case other than the fact that she had covered the case in Indiana. The juror refused to give her name to the news producer and the call lasted about 5 minutes.

The court next called in the three jurors individually. Each juror was informed of the nature of the inquiry the court intended to conduct and

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the offending juror was among the three jurors called in and did not want to alert the party who actually made the phone call. The court felt that this procedure would help ensure a more candid response from the responsible party. The court found that the closure of the hearing was "essential to preserve higher values," *In re Charlotte Observer,* 882 F.2d 850, 852 (4th Cir. 1989), specifically defendant's Sixth Amendment right to trial by an impartial jury and defendant's Fifth Amendment right to due process of law. Furthermore, the court's closure of the hearing was "narrowly tailored to serve that interest." *Id.* The hearings on this issue were closed only during the critical time before all the regular and alternate jurors testified. As soon as all the jurors testified, the transcripts were unsealed and made available to the news media. Eventually all of the jurors testified.

given an opportunity to meet with standby counsel before answering any questions under oath. The first juror questioned, foreperson Cynthia Wilson, availed herself of the opportunity to meet with standby counsel. While they met, the court brought in to the courtroom the other two jurors individually. Neither of these jurors decided to meet with standby counsel. Instead they answered all of the court's questions to the court's satisfaction that neither of these jurors had any knowledge of the phone call that prompted the court's inquiry.

When Wilson returned to the courtroom with her attorney, she admitted calling not only the television station the court knew about, but two others, while the trial was in progress.[3] Ms. Wilson denied discussing any evidence, Basham's demeanor, or any tentative ideas that any of the jurors may have had about the verdict. Ms. Wilson testified that none of the people she spoke with imparted any information

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[3] Wilson testified that her motivation in making the telephone calls was to have the news media cover the trial so as to forewarn women who might otherwise be disposed to shop alone of the dangers of parking in large parking lots, such as those at Walmart stores in the upcoming Christmas season. Defense counsel suggested that Wilson's motive was more ulterior, contending that she desired her "15 minutes of fame" and was attempting to set up an on-camera interview with the television stations after the verdict came in. One of the news representatives, Mays, testified that although the caller refused to disclose her name, she indicated that she would consent to an on camera interview after the verdict. When the verdict was announced, however, Wilson never called the stations back volunteering for an interview, thus lending a degree of credence to her proclaimed motive.

to her about the case.[4] She testified that her husband had followed the case on the internet, but had not informed her of what he had learned until after the trial. Ms. Wilson also testified that she was not aware of any discussions or comments by the jury prior to deliberations regarding their views on the death penalty or this case.[5]

Due to the conflicting evidence on whether there had been premature deliberations, the court decided to bring in all of the regular jurors (but not the alternates) for questioning on November 18, 2004.

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[4] There were some discrepancies in the testimony of Wilson and Shannon Mays, none of which are significant for purposes of the motion at hand. For example, Mays testified that Wilson told her information about events that occurred during the trial, such as a scuffle between Basham and the courtroom security officers and the fact that Basham had otherwise "acted up" during the trial. Mays also said that Wilson told her that the deliberations were likely to be protracted. Wilson denied providing this information to Mays. Mays testified that the phone call was received at the television station on Wednesday, October 27, a date she specifically recalled because it was her birthday. Wilson, on the other hand, testified that the call was made on Friday, October 29. When the phone records were ultimately obtained, they disclosed that Wilson was correct on the date and Mays was not. For purposes of the motion before the court at the present time, the important parts of the conversation were: (1) Wilson called the station in an effort to suggest to the station that it should cover the trial; and (2) Mays did not give any information to Wilson regarding the case or otherwise attempt to influence the jury.

[5] The court, the government, and the defense initially believed there may have been a problem of premature deliberations. The defense originally asserted, then dropped, the issue of premature deliberations. Had the issue been presented, the court would have determined, after having heard sworn testimony from all sixteen jurors, that there had been no premature deliberations.

The court then scheduled a third hearing for November 23, 2004 to question the alternate jurors, as well as Ms. Wilson (for a second time) and her husband Greg Wilson. The court learned no new information from its questioning of the jurors or Mr. Wilson. At the November 23, 2004 hearing, the court granted a defense motion to obtain Ms. Wilson's phone records.

The court held a hearing on December 13, 2004, at which time, the court learned, from a review of the phone records, that Ms. Wilson had called not only the three television stations that she admitted to, but also two upstate newspapers. The calls occurred on October 29, 2004 (the same day the television stations were called) between 6:22 p.m. and 6:43 p.m.[6] After this hearing, the court contacted the four other media outlets that Ms. Wilson called in an attempt to find someone who remembered answering the call. Two of the other media outlets sent letters stating that after a diligent search, they were unable to find an employee who remembered taking the call. One of the television stations, WYFF, was able to locate the recipient of the juror's call. The representative from WYFF appeared at a hearing on December 21, 2004. She testified that when the call came in, she sent an email to the news management and assignment desk. She testified that the caller asked why the station was not covering the trial, but

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[6] The toll records show that Ms. Wilson made the following calls: a 2-minute call to the Greenville News; a 1-minute call to the Spartanburg Herald; a 6-minute call to WSPA; three calls to WHNS—two 1-minute calls and a 4-minute call; and a 2-minute call to WYFF.

did not identify herself as a juror. She also testified that she did not recall imparting any information to the juror during the call and that she did not know about the Fulks' death sentence. Ms. Wilson also testified, for a third time, at the December 21st hearing and indicated that she did not recall making the phone calls to the newspapers.

The seventh hearing into this matter was held on December 28, 2004. At this hearing, the last remaining media outlet, the Greenville News, objected to the defendant's subpoena on First Amendment grounds. The court set a hearing for January 14, 2005 to allow the defendant time to brief the First Amendment issue. Prior to that hearing, the Greenville News dropped its challenge and issued a letter stating that after a diligent search, no one who remembered the call could be found.[7]

At the January 14, 2005 hearing, the defendant requested that the court conduct additional hearings and re-question all the jurors about conversations they may have had among themselves to look for potential grounds for error. The court denied this request due to concerns that further inquiry would invade the jurors' privacy. The court informed the parties that, after eight hearings into the question of juror misconduct, there would be no further investigation into the matter and a final hearing, for oral argument on the new trial motion, would be set. That hearing was conducted on February 14, 2005.

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[7] Defense counsel were satisfied with letters, rather than live testimony, from the news outlets that could not locate anyone who recalled fielding the call. It is quite probable that Wilson only left recorded messages with some of the news outlets.

In *United States v. Barnette*, 390 F.3d 775 (4th Cir. 2004), the Fourth Circuit examined the issue of the scope of an investigation a court must conduct upon a suspicion of improper jury conduct. In *Barnette*, the defendant complained that the court failed to conduct a sufficient inquiry into claims of potential juror bias. An alternate juror reported that one juror made a comment that exposed his bias, but could not identify the juror who made the comment. In response, the court asked the entire jury panel if anyone had disobeyed his instructions and none of them responded. The Fourth Circuit held that the court did not abuse its discretion in handling a claim of juror bias. *Id.* at 49-50.

This court has held nine hearings on the matter and heard, under oath, from all jurors (regular and alternates) individually, Ms. Wilson (on three different occasions), her husband and two members of the news media. The court has thus heard from a total of nineteen witnesses, authorized the subpoena of hundreds of records of phone calls from as many as three phones and facilitated the cooperation of five media outlets. The court has gone far beyond what the district court in *Barnette* did and far beyond what is required in this situation, in an effort to uncover the truth. Thus, the court denied the defendant's motion for further inquiry into the matter.

At the February 14, 2005 hearing, the court heard oral argument on the defendant's motion for a new trial. In addition to hearing argument, the court has read all memoranda and case law submitted by the parties and conducted its own research on the issues

raised. For the reasons explained below, the court denies the defendant's motion for a new trial.

II. DISCUSSION

a. Presumption of Prejudice

In this case, a member of the jury contacted five news organizations (3 television stations and 2 newspapers) and had conversations with representatives of at least two of these organizations. Such conduct clearly violated this court's admonitions, given 41 times during the trial, not to discuss the case with anyone.[8]

In the two conversations that were recalled and recounted at the hearings, the news organization representatives both were clear in their assertion that no information had been imparted to Ms. Wilson during the conversations. What the court is left with then is a clear case of juror misconduct, but at the same time, no indication that the conduct resulted in any information being given to the juror from an outside source. Nor was there any testimony that the two news representatives who spoke with Ms. Wilson suggested to her what the verdict should be in the case.

The defendant relies on *Remmer v. United States*, 347 U.S. 227 (1954) ("*Remmer I*") for the proposition that improper communications by the foreperson

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[8] In a separate hearing, the court held Ms. Wilson in contempt of court and required her to return $2,500 of the $5,900 she received for her jury service. Wilson was also ordered to perform 120 hours of community service.

during the trial are presumed to have prejudiced the defendant's right to a fair trial. *Remmer I* held:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Id. at 229.

The government questions the continued validity of the presumption articulated in *Remmer I* and its applicability in this case.

1. The continued validity of Remmer I

The government argues that the presumption of prejudice prescribed by *Remmer I* has been altered by subsequent case law. According to this argument, the defendant bears the burden of proving actual bias. *See, e.g., United States v. Corrado*, 304 F.3d 593 (6th Cir. 1996). However, in *Stockton v. Virginia*, 852 F.2d 740, 743-44 (1988), the Fourth Circuit considered and rejected the argument that the *Remmer I* presumption has been overruled: "We

cannot accept the Commonwealth's argument that the presumption of prejudice attaching to extrajudicial communications was overturned by the Supreme Court in *Tanner v. United States or Smith v. Phillips*." *Id.* at 743 (internal citations omitted). The Fourth Circuit reaffirmed this position in *United States v. Cheek*, 94 F.3d 136, 140-141 (4th Cir. 1996). Thus, the court finds, based on established United States Supreme Court and Fourth Circuit precedent, a presumption of prejudice attaches to extrajudicial communications and contact with a juror during the trial.

2. Applicability of Remmer I to this case

The government argues that the presumption set forth in *Remmer I* does not apply in this case because the contact was initiated by the juror and there have been no allegations of jury tampering. The government urges the court to treat this case as a juror misconduct case, such as *Tanner v. United States*, 483 U.S. 107 (1987), to which no presumption of prejudice would attach.

Tanner involved jurors who drank alcohol and used drugs during the trial. The Supreme Court held that juror testimony could not be used to impeach the verdict under those circumstances. As *Tanner* deals with matters internal to the jury, such as juror competence, it is inapplicable in the present case which concerns allegations of extrajudicial contact. The *Tanner* Court explicitly recognized that allegations of extraneous influence on the jury present an exception to the rule that juror testimony cannot be used to impeach a verdict. *Id.* at 117.

The government attempts to distinguish the present case from cases in which the contact was initiated by a third party. The government argues the potential for corruption of the verdict, which is patent in cases where a third party contacts a juror in an attempt to influence the juror or communicates information not before the jury, is not present in a case where the juror reaches out to a third party. The government points to language in *Stockton* that characterizes the issue as "the effect of a third party communication *to the jury*." *Stockton*, 852 F.2d at 744 (emphasis added). However, in *Cheek*, the Fourth Circuit clarified the elements necessary for the presumption to apply:

> To determine whether this contact was innocuous or whether it triggered the presumption explained in *Remmer I* we must turn to the factors the Supreme Court deemed important. These factors are: (1) any private communication; (2) any private contact; (3) any tampering; (4) directly or indirectly *with a juror* during trial; (5) about the matter before the jury.

Cheek, 94 F.3d at 141 (emphasis added).

Furthermore, at least one district court in the Fourth Circuit has applied the presumption of prejudice to communications initiated by the juror. *United States v. Lawhorne*, 29 F. Supp. 2d 292 (E.D.Va. 1998). In *Lawhorne*, a juror who had a prior business relationship with the prosecutor was seen giving the prosecutor the "thumbs up" sign. The

court, relying on *Cheek*, found that the presumption of prejudice was applicable and placed a "heavy burden" on the government to overcome the presumption. *Id.* at 308. The *Lawhorne* court found that the government had not overcome its burden of proof, even though there was no evidence of communication from the prosecutor to the juror.

Thus, the government's attempt to distinguish the present case based on the fact that the juror initiated the contact is unpersuasive. In the present case, there is evidence of "a private contact... with a juror during trial about the matter before the jury." *Cheek*, 94 F.3d at 141. Therefore, the court finds that the presumption of prejudice articulated in *Remmer I* applies to the present case.

b. Motion for New Trial

The contact between the foreperson of the jury and the news media are therefore presumed to be prejudicial. The government bears the burden of "prov[ing] that there exists no 'reasonable possibility that the jury's verdict was influenced by an improper communication.'" *Cheek*, 94 F.3d at 141.

The government argues that there was no prejudice. The evidence shows that the only information communicated to the juror was that the producer was familiar with the case because she had worked in Indiana. Furthermore, the fact that the juror made the calls [and therefore any information she might possibly have learned during the calls] was never communicated to the other jurors. The government argues there was no actual impact on the juror. Furthermore, the government

distinguishes this case from other extrajudicial contact cases, because here, the juror reached out. Because of this unique circumstance, the government contends the possibility of prejudice is not as great. The government also argues that the contact, initiated by the juror, not a third party, was innocuous as to the substance of this case.

This case presents a unique situation involving egregious misbehavior by a juror, but no showing that she learned anything or was influenced in any way. Other courts have addressed similar, though not identical, situations.

In *United States v. Boykin*, 275 F. Supp. 16 (M.D.Pa. 1967), the defendant was on trial for an assault with a dangerous weapon which occurred while he was in prison. A juror rode to the trial with several employees from the penitentiary where the crime occurred. The defendant alleged that during the drive, the juror commented on the case. The court found no evidence of any improper comment and found that the defendant had not been prejudiced. *Id.*

In *United States v. Diez*, 736 F.2d 840 (2d Cir. 1984), while the jury was deliberating, the court discovered that, during the trial, a juror asked a police officer in a bar about the officers who testified in the trial. The police officer responded that he knew them. The *Diez* court questioned the juror after the verdict was announced and found that the interaction was frivolous. *Id.* at 845-46.

In *O 'Neal v. Cowles Magazines, Inc.*, 225 F.2d 43 (D.C. Cir. 1955), the plaintiff alleged that a juror told

a friend what the verdict would be during the trial. The court found there was "no showing that the juror had been influenced by the defendants or that the statement (if made) in any way prejudiced the plaintiff or prevented the trial from being a fair one." *Id.* at 45. The situation in *O 'Neal* is very similar to that in the present case, in that the juror reached out to a third party. Furthermore, as in the present case, the *O'Neal* court was faced with a situation which objectively does not produce great concerns that the right to a fair trial had been violated.

In the present case, the contact did not involve the defendant, the government, or any witnesses in the case. The juror reached out to strangers to the suit who would have had no information other than what was available in the public arena. There is no indication that the media outlets that were contacted imparted any knowledge to the jury. Furthermore, there is no indication that the media outlets attempted to influence the juror in any way, or that they were motivated to influence the outcome of the case. Furthermore, there is no evidence that the juror informed the other members of the jury about the phone calls.

The Sixth Amendment's guarantee of the right to an impartial jury is one of the most important rights a criminal defendant possesses. However, as the Fourth Circuit has noted:

> [J]ury verdicts are not to be lightly cast aside. Our system of criminal justice rests in large measure upon a confidence in conscientious juror

> deliberations and juror attentiveness, both to the evidence at trial and to the instructions of the trial judge. This confidence is not to be displaced every time a third party communication reaches the ears of a juror during trial.

Stockton, 852 F.2d at 744.

The court finds that the government has sufficiently overcome the presumption of prejudice to show that there is "no reasonable possibility that the jury's verdict was influenced by an improper communication." *Cheek*, 94 F.3d at 141.

c. Due Process of Law

The defendant further argues that when a juror flagrantly violates the court's orders, the resulting taint is a due process violation in and of itself regardless of whether there was any determinable influence on the jury. According to the defendant, the jury system failed him and he did not receive due process of law. The defendant argues that if this conduct had come to light before the verdict, the court would have excused the juror. According to the defendant, the defendant has a right to a trial with an impartial jury, and, by virtue of having this juror on the jury, he was denied that right. The defendant asserts that this was a structural error which should not be subjected to a harmless error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991).

In *Sherman v. Smith*, 89 F.3d 1134 (4th Cir. 1996), the Fourth Circuit examined the issue of when an error should be subjected to a structural error analysis, rather than a harmless error analysis. In

Sherman, a juror visited and examined the crime scene during the trial. The Fourth Circuit warned,

> judges should be wary of prescribing new errors requiring automatic reversal. Indeed, before a court adds a new error to the list of structural errors (and thereby requires the reversal of every criminal conviction in which the error occurs), the court must be certain that the error's presence would render every such trial unfair.

Id. at 1138.

The *Sherman* court rejected the argument that juror misconduct represents structural error which always requires reversal. In doing so, the *Sherman* court pointed to numerous Supreme Court and Fourth Circuit opinions in which the court used harmless error analysis to evaluate a juror misconduct issue. *See id.* at 1139. Thus, this court finds, under established precedent, the error complained of by the defendant is not subject to structural error analysis.

Furthermore, there has been no showing that the juror's actions in this case was anything other than harmless error, as there has been no showing that the verdict would have differed had this not occurred or had the court discovered the juror's indiscretion prior to the verdict and dismissed the juror. Therefore, the court denies the defendant's motion for a new trial.

III. CONCLUSION

The court finds that a presumption of prejudice attaches to an improper contact regarding a matter before the jury between a juror and a third party during a trial. The court further finds that the government met its heavy burden to overcome this presumption. The defendant was not prejudiced by the contact between the juror and the news media. Accordingly, the court denies Mr. Basham's motion for a new trial.

IT IS SO ORDERED.

/s/ Joseph F. Anderson, Jr.
United States District Judge

March 14, 2005
Columbia, South Carolina

Appendix C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Ex Parte: Juror Cynthia Wilson	) CR.No.: 4:02-992
	)
In re:	)
	)
United States of America	) **ORDER FOR**
	) **CONTEMPT**
v.	) **SANCTIONS**
	)
Brandon Leon Basham	)
	)

This matter is before the court upon its Order and Rule to Show Cause directed to Cynthia Wilson, a member of the trial jury in the capital murder case indicated above, to show cause why she should not be held in contempt of court for failure to abide by the court's repeated instructions regarding extrajudicial conversations about the case while the trial was in progress. In an order dated January 14, 2005, Ms. Wilson was officially notified that the court was considering the imposition of a contempt sanction and was apprised of the charges against her. The matter came before the court for a hearing on January 24, 2005. Present were Ms. Wilson and her attorney, J. Preston Strom, Esquire. After hearing from Ms. Wilson, a character witness, and her attorney, the court has determined that Ms. Wilson is in contempt of this court and should be sanctioned accordingly.

PROCEDURAL HISTORY

Ms. Wilson was empaneled as one of the regular jurors in the capital murder case of United States of America v. Brandon Leon Basham. The case was tried in this court during the months of August, September, October, and November, 2004. Ms. Wilson was elected as the foreperson of the jury by a vote of the jury shortly prior to commencement of the deliberations at the guilt phase of the trial.

Basham and a co-defendant, Chadrick Evan Fulks, were charged with the death of Alice Donovan, a resident of Gallivant's Ferry, South Carolina, in November 2002. Testimony at the trial showed that Basham and Fulks escaped from a county detention facility in Kentucky and thereafter engaged in a 17-day crime spree. Among other things, they forcibly kidnapped and killed Samantha Burns, a 19-year old college student in West Virginia, and Alice Donovan, a 44-year old mother of two who resided near Myrtle Beach, South Carolina. The remains of both Ms. Bums and Ms. Donovan have never been located. The evidence showed that Ms. Donovan was transported into North Carolina prior to her demise. Because of the interstate transportation involved and because the body was never found, Basham and Fulks were charged in U.S. District Court with carjacking resulting in death (18 U.S.C. § 2119), kidnapping resulting in death (18 U.S.C. § 1201), and other federal firearms and automotive theft offenses.

At trial, the government called a total of 134 witnesses, all but a few of whom were from states

other than South Carolina. The defense called a total of 31 witnesses and the trial spanned four months.

During jury selection and throughout the trial, the court gave repeated warnings to the jury that they were not to discuss the case with anyone, not even fellow jurors. These warnings can be summarized as follows:

The court initially summoned a total of 800 potential jurors drawn from a state-wide jury list. When jurors reported to the courthouse for individual voir dire, they were allowed to view a videotape presentation which, for the first time, introduced them to the case under consideration and, among other things, instructed the jury, "Please remember at all times, you may not discuss the questions or your answers on the [jury] questionnaire or anything about this case with anyone."

Jurors were then brought to the courtroom for individual questioning by the court and the attorneys for both sides. At the conclusion of voir dire, each juror was again individually reminded of his or her obligation not to discuss the case while the trial was in progress.

After the jury was selected, the jurors who were to be seated on the case were contacted by telephone and by letter. The telephone message instructed the jurors that, among other things, they were "not to discuss this case with anyone, even your fellow jurors." The letter that was sent as a follow-up included the following sentence: "You must not

discuss this case with anyone, nor permit anyone to discuss it with you."

On the first day of trial, in its preliminary instructions, the court included not one, but two admonitions not to discuss the case.

After the first day of testimony, an unfortunate incident occurred which caused the court to redouble its efforts to impress upon the jury the obligation not to discuss the case. It was reported to the court that while on the elevator in the juror parking garage, one member of the jury commented, apparently to no one in particular, "That was some heroic testimony we heard today." When the court learned of this development, it immediately excused the juror who made the offending comment and gave the following strong cautionary instruction to the remaining jurors:

> THE COURT: Members of the jury, before we begin testimony let me give you some cautionary instructions along the lines of what I told you last week again. It is critically important that the jury in this case and in every criminal case remain open-minded until the end of the trial. We went over that pretty extensively with all of you in the selection process. It would be inappropriate for any of you to form an opinion, make a decision about any of the issues in this case until you have heard

all of the evidence. Likewise, it is inappropriate for any of you to discuss this case in any way, shape, or form with anyone else, including your fellow jurors. Now, that sounds like asking a lot, I realize, because it [sic] is a lot of temptation as you are here together in the jury room during breaks, coming and going—always a temptation to make an offhand comment about something you heard during the day. Any comment, no matter how casual or how offhand it might seem, would be a violation of your oath as jurors not to discuss the case with anyone. So, I just want to drive that point home as hard as I can. You may not discuss this case. You may not express any opinion about this case. You may not comment about this case. You may not comment about any witness who has testified or any event that has occurred. You simply cannot say anything until the end of the trial when I give you my final instructions and then tell you that you may go to the jury room and begin your deliberations. Then, and only then, may you discuss this case. Until that time,

> you are under an oath, as jurors in this case, not to make any remark about this case, or any witness in this case, or any event in this case, any lawyer in this case. You simply cannot talk about it. I might not have made that clear enough at the beginning, but I just want to reiterate it now.

Trial Transcript of September 20, 2004 at 37.

Following this development, the court instructed the jury each day of the trial, upon the conclusion of the day's testimony and usually at the beginning of the lunch break, that they were not to discuss this case. In all, instructions not to discuss the case were given a total of 41 times during jury selection and trial.

In spite of the rather overwhelming number of times that the court instructed the jury not to discuss the case, the evidence has shown, and Ms. Wilson has admitted, that on Friday, October 29, 2004, (a date on which the court had adjourned so that the jurors could go home to vote by absentee ballot in the upcoming presidential election), she telephoned news organizations in upstate South Carolina to inform them of the trial and to inquire as to why they were not covering the trial. Ms. Wilson has admitted calling three news outlets (television stations WSPA in Spartanburg, WYFF in Greenville, and WHNS in Greenville). Additionally, the court's own investigation, which included a review of the

telephone toll records for Ms. Wilson's home phone, revealed that she called two newspapers as well: *The Greenville News* and *The Spartanburg Herald*, both daily newspapers published in upstate South Carolina.

Of the five news organizations contacted, only two could locate an individual who recalled receiving Ms. Wilson's telephone call. Both of these news representatives indicated that the general thrust of the conversation involved Ms. Wilson informing the recipient of the call that the Basham trial was a newsworthy case and then inquiring as to why the particular news organization was not covering the trial. Both news representatives responded that the events of Ms. Donovan's death and the trial were outside of the coverage area of their respective news organizations. One call recipient, Shannon Mays of television station WSPA in Spartanburg, also recalled Ms. Wilson providing details of the trial, such as the fact that Basham had gotten into a scuffle with courtroom security officers during the trial and had attempted to sleep while the trial was in progress.

When the court learned of the developments outlined herein, through a phone call from Ms. Mays to the assistant United States Attorney prosecuting the case (who promptly relayed the information to the court and opposing counsel), the court scheduled a hearing to determine the extent and nature of the contacts that had been made by Ms. Wilson.

In an effort to be fair to Ms. Wilson, the court appointed J. Preston Strom, Esquire, an attorney

with extensive federal practice experience, to represent Ms. Wilson on the issue of Ms. Wilson's juror misconduct and indicated that he would be paid out of the Criminal Justice Act funds.

After conferring with Mr. Strom, Ms. Wilson acknowledged the three calls to the three television stations. She did not, however, reveal the two calls to the newspapers. Acting at the request of defense counsel, the court required Ms. Wilson to provide her home and mobile telephone numbers and authorized the United States Attorney's office to obtain subpoenas for telephone toll records to learn of any additional calls. This additional search disclosed the two calls to the newspapers. When confronted with these two additional calls at a later hearing, Ms. Wilson indicated that she simply did not recall making those two calls.

Based on the foregoing, it appeared to the court that Ms. Wilson was potentially in contempt of court in two respects: (1) her disregard of the court's instructions not to discuss the case with anyone; and (2) her failure to be completely truthful when queried about contacts with the news media.

INAPPROPRIATE EXTRAJUDICIAL CONVERSIONS WITH NEWS ORGANIZATIONS

"To support a conviction of criminal contempt for violation of a court order, the Government must prove beyond a reasonable doubt that the defendant willfully violated a decree that was clear and left no uncertainty in the minds of those that heard it." *United States of America v. Linney*, 134 F.3d 274, 278 (4th Cir. 1998).

Ms. Wilson's inappropriate contact with five news organizations despite being warned over 40 times by this court that she should not discuss the case with anyone, including fellow jurors, clearly merits a contempt citation. Indeed, at the January 2005 hearing, Ms. Wilson admitted that her actions constituted contempt. As indicated above, the juror's offhand comment in the elevator that occurred on the first day of trial caused the court to be especially careful in repeatedly warning the jury not to discuss the case, comment about the case, or permit anyone to discuss it with them while the trial was in progress. Moreover, Ms. Wilson's transgression was not simply an isolated remark, casually made on an elevator or at a water cooler. She personally looked up the telephone numbers of five separate news organizations and placed calls to each of them. Her actions were thus a contempt of court of the highest order.

FAILURE TO BE COMPLETELY FORTHCOMING

When the court began its post-verdict inquiry, Ms. Wilson was summoned to the courthouse, with no forewarning of the issue to be discussed and, at the commencement of the hearing, was informed of the nature of the inquiry the court wished to conduct. She then was advised that an attorney was on standby to represent her if she decided she needed one, and she indicated that she would like to talk with an attorney. Following a private discussion with attorney Strom, Ms. Wilson admitted to the court under oath making calls to the three television stations, but did not refer to the two calls to the

newspapers. The court's followup questioning was not as clear and precise as it could have been, but suffice it to say that Ms. Wilson was aware of the nature of the court's inquiry and did not voluntarily disclose the two additional calls that were later discovered. She has indicated to the court that her failure to disclose the two additional calls was the product of her faulty memory. The court will afford Ms. Wilson the benefit of the doubt on this issue and will not hold her in contempt for failure to be completely forthcoming.

LEGAL AUTHORITY

This court is empowered to levy contempt citations against jurors who misbehave. Title 18, United States Code, Section 401 provides, in pertinent part, that:

> A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority... as... [d]isobedience or resistence to its lawful writ, process, order, rule, decree, or command.

Rule 42 of the Federal Rules of Criminal Procedure establishes the protocol for holding a person in contempt. Essentially, the court must give the person notice of the possibility of contempt in open court or in an order to show cause. The notice must state the time and place of trial and allow the defendant a reasonable time to prepare a defense. The notice must also state the essential facts constituting the charged criminal contempt and

describe it as such. The court's order of January 14, 2005 complies with these requirements.

Rule 42 also provides a mechanism for appointing a prosecutor and, in certain cases, for a jury trial. Here, the respondent expressly waived the right to have a special prosecutor appointed and, inasmuch as the court announced at the commencement of the hearing that it would under no circumstances impose a prison sentence of more than 6 months, a jury trial is not required. *See United States of America v. Linney*, 134 F.3d 274,281 (4th Cir. 1998).

Having provided Ms. Wilson with the required notice and an opportunity to be heard, and in view of the undisputed misconduct at issue here, the court determines as a matter of fact that Ms. Wilson's five telephone calls to news organizations violated the court's repeated admonitions not to discuss the case with anyone. She is, for this reason, in contempt of this court.

SANCTION

Ms. Wilson's contumacious conduct strikes at the heart of the system of justice that we all hold dear. In the Declaration of Independence, one of the specific "abuses and usurpations" levied against King George III was that he had denied colonists "the benefits of trial by jury." When the documents forming this country were drafted, trial by jury was considered so important that it was mentioned three times in the United States Constitution and in 49 of the 50 state constitutions. A jury of lay citizens is a quintessentially democratic body—people randomly selected from all walks of life, with no stake in the

controversy, called to the courthouse to settle criminal and civil disputes. Our jury trial system is American bedrock—not perfect, but full of legal protections that put justice in the hands of the people.

In recent years, the American system of jury trials has come under attack. Jurors are said to be malleable dupes, easily persuaded to return bizarre and unprincipled verdicts at the hands of crafty lawyers. Those involved in the operation of the judicial system know that these attacks are largely unwarranted.

It is especially disheartening, therefore, when jurors such as Ms. Wilson intentionally violate the court's instructions and thereby jeopardize a verdict in a criminal case.

Ms. Wilson is a college-educated nurse with the ability to forfeit monies that have been paid to her or on her behalf without hardship. She also has the skills to perform some type of community service work, preferably by assisting the United States Probation Office draw blood samples of criminal offenders as part of a DNA registry system.

Accordingly, the court determines that Ms. Wilson's conduct, as outlined herein, constitutes a contempt of this court. As punishment, it is hereby ordered as follows: (1) Ms. Wilson shall disgorge and return to the government via the Clerk's office $2,500.00 of the $5,624.84 dollars paid to her for her

jury service, to be paid within six months;[1] and (2) Ms. Wilson shall perform 120 hours of community service work,[2] to be completed within one year, under the direction and supervision of the United States Probation Office.

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[1] It was the court's intention to require Ms. Wilson to reimburse the Criminal Justice Act all monies expended to defray the services of her court-appointed attorney. However, at the contempt hearing, Mr. Strom informed the court that Ms. Wilson had retained him and paid him directly and that, for this reason, he would not be submitting vouchers to the government for reimbursement. The court has, however, considered the fact that Ms. Wilson was required to expend monies to retain Mr. Strom in fashioning the sanction in this case.

[2] A fulfillment of the court's requirement for community service by drawing blood samples from offenders for the Probation Office would enable Ms. Wilson to use her training and experience in a way to benefit the government and conserve scarce resources for a division of this court that is struggling financially. During the last fiscal year, the United States Probation Office for the District of South Carolina was required to terminate 21 employees because funds were not available to pay their salaries. The Probation Office informs the court that it is required to pay a private contractor $12 per sample for drawing blood. Thus, a fulfillment of the community service commitment in this fashion will draw upon Ms. Wilson's talents and will assist a beleaguered federal agency in a time of budget shortages. Although the court has expressed its preference in this regard, the Probation Office is free to schedule Ms. Wilson for community service as it deems appropriate.

IT IS SO ORDERED.

/s/ Joseph F. Anderson, Jr.
Joseph F. Anderson, Jr.
United States District Judge

February 16, 2005
Columbia, South Carolina

Appendix D

FILED: June 26, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-5
(CR-02-992)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BRANDON LEON BASHAM

Defendant - Appellant

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Williams, Judge Traxler and Judge King.

For the Court

/s/ Patricia S. Connor, Clerk

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
APR 26 2010
OFFICE OF THE CLERK

(2)

No. 09-617

In the Supreme Court of the United States

BRANDON LEON BASHAM, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the misconduct of a juror who called several news outlets during trial constitutes structural error, reversible without any showing of prejudice.

2. Whether the district court abused its discretion in concluding that petitioner was not prejudiced by the juror's calls after finding that no juror received any substantive information about the case from the media.

3. Whether the district court abused its discretion in denying petitioner's motion for further investigation into the juror's calls to other jurors after holding multiple evidentiary hearings and taking testimony from all jurors.

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In the Supreme Court of the United States

No. 09-617

BRANDON LEON BASHAM, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-72a) is reported at 561 F.3d 302. The opinion of the district court denying petitioner's motion for a new trial (Pet. App. 73a-92a) and its contempt order (Pet. App. 93a-106a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2009. A petition for rehearing was denied on June 26, 2009 (Pet. App. 107a.) On September 9, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 23, 2009, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of carjacking resulting in death, in violation of 18 U.S.C. 2119; kidnapping resulting in death, in violation of 18 U.S.C. 1201(a); interstate transportation of a stolen vehicle, in violation of 18 U.S.C. 2312; conspiracy to commit carjacking, kidnapping, interstate transportation of a stolen vehicle, felon in possession of a firearm, and possession of stolen firearms, in violation of 18 U.S.C. 371; conspiracy to use and carry firearms during and in relation to, and to possess firearms in furtherance of, crimes of violence, in violation of 18 U.S.C. 924(*o*); using and carrying firearms during and in relation to, and possessing firearms in furtherance of, crimes of violence, in violation of 18 U.S.C. 924(c); being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g); and possession of stolen firearms, in violation of 18 U.S.C. 922(j). Pet. App. 14a. He was sentenced to death on the carjacking and kidnapping counts and to a total of 744 months of imprisonment on the remaining counts. *Id.* at 18a. The court of appeals affirmed. *Id.* at 1a-72a.

1. In November 2002, petitioner and Chadrick Fulks escaped from a prison in Kentucky and went on a multi-state crime spree in which they killed two women. Pet. App. 2a-13a.

First, petitioner and Fulks kidnapped a man, tied him up, and stole his car. They drove to Indiana where they met Tina Severance, a former girlfriend of Fulks, and her friend Andrea Roddy. Aided by the women, the men stole firearms from a friend of Severance. Peti-

tioner, Fulks and the two women then drove to West Virginia, where they rented a motel room near Huntington. Pet. App. 2a-5a.

On November 11, 2002, petitioner and Fulks left the two women at the motel room. The same evening, Samantha Burns, a college student who worked at a mall in Huntington, called home and said that she was at a friend's house and would be leaving soon. During the morning of November 12, a local fire department team went to a cemetery three miles outside of Huntington to investigate a report of an explosion and a fire. They found Burns's burnt-out car there. When petitioner and Fulks returned to their motel room that morning, petitioner was wearing around his neck a ring that belonged to Burns. A candy box that belonged to Burns was later found in the vehicle the men had been driving. Burns was never seen alive again. Pet. App. 5a-6a.

Petitioner, Fulks, and the two women next drove to South Carolina. Petitioner and Fulks left the women at a hotel room in Myrtle Beach and, after a thwarted attempt to steal firearms from a home, drove to a Wal-Mart in Conway. Pet. App. 6a-7a. In the parking lot of the Wal-Mart, petitioner approached a blue BMW driven by Alice Donovan. Petitioner entered the car and forced Donovan to drive to the back of the parking lot, where Fulks was waiting. Fulks entered the car and drove away. Shortly thereafter, at the Bee Tree Farms hunt club in Winnebow, North Carolina, several men saw two men and a woman in a blue BMW. Donovan was never seen alive again. *Id.* at 7a.

Petitioner and Fulks returned to their motel in Myrtle Beach and told the two women that they had to leave because the police were after them. On November 17, 2002, petitioner tried to carjack a vehicle at the Ashland

Mall in Ashland, Kentucky. He fled as the police approached, firing a gun at a pursuing officer. Police arrested petitioner and seized from him a knife that belonged to Donovan. Meanwhile, after hearing a news report of petitioner's arrest, Fulks fled in Donovan's BMW to his brother's residence in Indiana, where he was arrested on November 20, 2002. Pet. App. 7a-10a.

During interrogation following his arrest, petitioner made incriminating statements about his role in the killings of Burns and Donovan. Later, petitioner agreed to assist law enforcement agents in finding Donovan's body. On November 28, 2002, petitioner accompanied the agents as they searched an area in Brunswick County, North Carolina. Near the Bee Tree Farms Cemetery, petitioner was asked "Is this where it happened?" Petitioner replied, "This is it. It is." The searchers did not find Donovan's body. Pet. App. 10a-12a. Petitioner later made incriminating statements in letters to a friend and admitted killing two women in a telephone call to a former middle-school teacher. *Id.* at 12a-13a.

2. In 2003, a grand jury sitting in the District of South Carolina returned a superseding indictment charging petitioner and Fulks jointly with eight counts: carjacking resulting in death, in violation of 18 U.S.C. 2119; kidnapping resulting in death, in violation of 18 U.S.C. 1201(a); interstate transportation of a stolen vehicle, in violation of 18 U.S.C. 2312; conspiracy to commit carjacking, kidnapping, interstate transportation of a stolen vehicle, felon in possession of a firearm, and possession of stolen firearms, in violation of 18 U.S.C. 371; conspiracy to use and carry firearms during and in relation to, and to possess firearms in furtherance of, crimes of violence, in violation of 18 U.S.C. 924(*o*); using

and carrying firearms during and in relation to, and possessing firearms in furtherance of, crimes of violence, in violation of 18 U.S.C. 924(c); being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g); and possession of stolen firearms, in violation of 18 U.S.C. 922(j). Pet. App. 13a-14a. On September 13, 2003, the government notified the defendants that it would seek the death penalty on the carjacking and kidnapping counts under 18 U.S.C. 3593(a). *Id.* at 14a.

In September 2004, petitioner was tried for 13 days before a jury that found him guilty on all counts. Pet. App. 15a-16a. On November 2, 2004, after a 16-day capital sentencing hearing, the jury sentenced petitioner to death on the carjacking and kidnapping counts and to 744 months of imprisonment on the remaining counts. *Id.* at 16a-18a.[1]

3. On November 3, 2004, the day after the jury returned petitioner's death sentence, a news producer from WSPA, a television station in Greenville, South Carolina, called the prosecutor to tell him that a woman purporting to be a juror in the case had contacted her during the trial. The producer, Shannon Mays, also said that the juror had asked why the station was not covering the trial, told Mays that she believed the jury might have a difficult time reaching a decision in the penalty phase because jurors had different views on the death penalty, and informed Mays that petitioner had "acted out" during the trial. Pet. App. 19a.

The prosecutor immediately informed the district court and petitioner of the call. Pet. App. 20a. On No-

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[1] In May 2004, Fulks pleaded guilty to the superseding indictment. In June 2004, a jury imposed a death sentence, which was affirmed on appeal. See *United States* v. *Fulks*, 454 F.3d 410 (4th Cir. 2006), cert. denied, 551 U.S. 1147 (2007).

vember 10, 2002, the district court held a status conference to discuss the issue. *Ibid.* Over the next two months, the court held nine evidentiary hearings and received live testimony from at least 19 witnesses, including all 16 jurors and alternates. *Id.* at 82a.

a. At the first hearing on November 12, 2004, the court learned that Cynthia Wilson, the jury foreperson, had placed the call to Mays. Mays testified that she talked to a person who had identified herself only as a juror in petitioner's case and who wanted to know why WSPA was not covering the trial. Mays replied that the trial was not within WSPA's viewing area and that television cameras were not allowed in federal courtrooms. The caller said that the case would be "good TV" because petitioner had acted up in court and had fallen asleep, and because three jurors were from the station's viewing area in upstate South Carolina. Mays testified that she knew petitioner had fallen asleep at trial because she had read about it in the newspapers, but she did not respond to the caller on that point. The caller then asked Mays whether she was familiar with the case. Mays replied that she was working for an Indiana television station when petitioner and Fulks had escaped from prison and her station had covered their escape. At one point, Mays "chuckled" and referred to the trial as a "never ending" case, but she did not disclose to the caller her substantive knowledge of the underlying events. Pet. App. 20a; C.A. App. 2851-2864.

According to Mays, the caller identified "some concern on her part over whether or not Mr. Basham would be sentenced to death, because there were jurors that were for the death penalty and others that were not." C.A. App. 2853, 2866. Mays assumed that the caller made that statement because she was fearful the jury

would not reach a death verdict. *Id.* at 2866. Mays had no indication from the caller that the jurors were already discussing the case. *Id.* at 2868. The caller ended the conversation by telling Mays that she would be available for an interview after trial. Mays advised the caller to make contact again at that point. *Id.* at 2851-2854, 2862-2863.

Wilson testified that she was the one who had placed the call to Mays and that she had also called two other television stations: WHNS in Asheville and WYFF in Greenville. Wilson stated that she had made the calls because of the nature of petitioner's crimes and to make "people * * * aware." She testified that she spoke to one media person who knew that petitioner had escaped from prison, but that she learned no additional information from the calls. Wilson said that she did not disclose any trial information or the jury's views about the case to the media persons because she did not know any other juror's views. According to Wilson, the jurors did not discuss before deliberations the penalty to be imposed on petitioner. Wilson added that she could not recall whether the jurors had any philosophical discussions about the death penalty. Pet. App. 20a; C.A. App. 2904-2908, 2910-2911.

Wilson further testified that she did not do any research about the case on the Internet while she was a juror. She admitted that her husband had done Internet research about the case, but she said that he did not discuss the merits of the case with her until the trial was over. She denied that anyone talked to her about the case during the proceedings. She also denied telling any newsperson that petitioner had acted up or had fallen asleep during trial or that the jury might not reach a penalty verdict. Pet. App. 20a; C.A. App. 2909-2914.

b. Following Wilson's initial testimony, petitioner moved for further proceedings on whether the jury had engaged in premature deliberations. The district court granted that request and held hearings on November 18 and November 23, 2004. At those hearings, the court heard testimony from all of the remaining jurors and alternates. None mentioned that Wilson had brought any external information to his or her attention. Pet. App. 21a.

Juror Shelda Richardson testified that she did not deliberate prematurely but that Wilson had asked her how she felt about certain issues. Richardson explained that Wilson had commented on some witnesses' testimony to gather feedback. Richardson also testified that Wilson had conversations with other jurors but that Richardson did not know the substance of those conversations. Pet. App. 21a; C.A. App. 2944-2947. Richardson explained that she stopped talking to Wilson when Wilson tried to discuss the case. Richardson believed that Wilson was an "either[/]or" person who "already had her mind made up to a certain degree." Pet. App. 21a (quoting C.A. App. 2970). Richardson did not remember the "specifics" of her conversations with Wilson but testified that Wilson "never said anything" about how Wilson felt about the death penalty, and Wilson did not ask Richardson about her "attitude" concerning the death penalty before deliberations. C.A. App. 2969-2971; Pet. App. 21a.

Juror June Robertson testified that she did not know whether any juror had deliberated prematurely and that Wilson had not "questioned" her. Robertson had seen Wilson talking to another juror during the penalty

phase, but Robertson did not know the subject of their discussions.[2] C.A. App. 2955-2957, 2976-2977.

The court recalled Wilson twice during the November 23 hearing. During the first round of testimony, Wilson stated that she did not recall the names of the persons with whom she spoke at the television stations but that neither any media person nor her husband had given her any information about petitioner's case. Wilson testified that she talked with her fellow jurors only about personal matters. Wilson also testified that during the penalty phase, one juror had heard juror Richardson say that her church was opposed to the death penalty but that she would have to weigh all of the evidence in this case. Wilson denied asking Richardson to comment on the substance of any witness's testimony. C.A. App. 2992-2999.

Gregory Wilson, Wilson's husband, testified that he had "googled" petitioner on the Internet during the trial but that he did not disclose his research to Wilson until the trial was over. He further testified that Wilson was "excited" when she learned that she had been selected as a juror. C.A. App. 3000-3007.

Wilson testified again after her husband, stating that during the penalty phase she and two jurors had a brief discussion about a defense witness's description of a scientific test. Wilson testified that her motive in calling the television stations was to promote "public safety awareness" because of the way the crime had been committed. She stated that, after the trial, she had tried to arrange self-defense classes for people who live alone. C.A. App. 3023-3027; Pet. App. 20a.

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[2] Another juror testified that she was not involved in any premature deliberations but that she and Wilson had talked about Wilson's nursing experiences during the trial. C.A App. 2958-2960.

c. The district court postponed additional hearings to allow petitioner to obtain Wilson's telephone records. On December 13, 2004, the district court learned that Wilson had called two newspapers in addition to the three television stations. According to her phone records, Wilson had made a six-minute call to WSPA, two one-minute calls and a four-minute call to WHNS, a two-minute call to WYFF, a two-minute call to the Greenville News, and a one-minute call to the Spartanburg Herald. Wilson had not mentioned the latter two calls in her initial testimony. Pet. App. 21a-22a. All of the calls were made on October 29, 2004, after the close of evidence in the penalty phase proceeding but before jury instructions were given and deliberations began. *Ibid.*

The district court then contacted the media outlets revealed by the phone records and held additional hearings to determine whether any other reporters remembered speaking to Wilson. On December 21, 2004, a WHNS employee testified that he had investigated the matter, that no employee remembered taking a call from Wilson, and that, in any event, such a call would not have received attention because petitioner's trial was outside WHNS's coverage area. Pet. App. 22a; C.A. App. 3122-3125. Stephanie Moore, a WYFF employee, testified that she emailed her supervisors about a call to the station reporting that closing arguments in petitioner's case would begin the following Monday and asking whether "we care." Moore further testified that the caller was a female and that, although the caller might have said her name, she had not identified herself as a juror. Moore did not recall her response to the caller, but she testified that such a call would normally have led her to email the management. Moore testified that she

might have said something to the caller about her knowledge of the case. Pet. App. 22a; C.A. App. 3126-3135.

The district court stated that it had *sua sponte* contacted the Spartanburg Herald and the Greenville News. The court related that an employee of the Spartanburg Herald confirmed that the paper had investigated the matter but that nobody could recall taking a call from Wilson. Later, the Greenville News informed the court that, despite a diligent search, it could not find any person who remembered taking a call from Wilson. C.A. App. 3135-3143, 3253-3254.

At the conclusion of these hearings, the district court recalled Wilson and asked her about her phone calls to the newspapers, which Wilson said she did not remember making. Petitioner's counsel then asked Wilson about an 11-minute telephone call that she had made to another juror just before she called the news outlets. Wilson testified that she had merely offered the juror a landscaping job at her house. Asked about WYFF employee Moore's testimony concerning the call to the station, Wilson testified that she did not recall making any statements to Moore but that it was possible Moore made statements to her. Pet. App. 22a; C.A. App. 3148-3155.

e. On January 14, 2005, petitioner moved for a further investigation because Wilson's telephone records showed that she had made 71 telephone calls, many of them lengthy, to two other jurors in September and October 2004 and that Wilson and her husband had called each other during trial. The court denied the motion, noting that it had already heard testimony from the two other jurors on the calls and that it had credited their testimony that they did not deliberate prematurely.

Pet. App. 22a-23a; C.A. App. 3176-3184, 3229-3230, 3234-3237.

4. a. On February 14, 2005, after briefing and argument, the district court orally denied petitioner's motion for a new trial. C.A. App. 3255. On March 14, 2005, the court explained its reasoning in a lengthy opinion. Pet. App. 73a-92a.

The court found as a factual matter that, despite Wilson's calls to the television stations, none of the reporters provided "any information to Wilson regarding the case or otherwise attempt[ed] to influence the jury." Pet. App. 79a n.4. The court explained that Moore and Mays "were clear in their assertion that no information had been imparted to Ms. Wilson during the conversations," *id.* at 83a, and that although there were some conflicts between Mays's testimony and Wilson's testimony, "none [was] significant for purposes of the motion." *Id.* at 79a n.4. The court stressed that there was "no indication that the conduct resulted in any information being given to the juror from an outside source[, n]or was there any testimony that the two news representatives * * * suggested to her what the verdict should be in the case." *Id.* at 83a. The court also found that Wilson did not disclose to the other jurors her telephone calls to the media, *id.* at 89a, and that—because Wilson did not call the stations following the verdict—there was a "degree of credence" in her testimony that her motive had been to educate the public about safety issues. *Id.* at 78a n.3.

Turning to the applicable law, the court concluded that the framework set forth in *Remmer* v. *United States*, 347 U.S. 227 (1954), controlled petitioner's claim of juror misconduct. Pet. App. 84a-97a. The court rejected the government's argument that *Remmer* had

been undermined or invalidated by subsequent decisions. *Id.* at 84a-85a. Applying *Remmer*, the district court reasoned that Wilson's misconduct was "presumptively prejudicial," *id.* at 84a (quoting *Remmer*, 347 U.S. at 229), and that the government bore a "heavy burden" to rebut that presumption by showing that "there is no reasonable possibility that the jury's verdict was influenced by an improper communication," *id.* at 87a, 90a (internal citations omitted). Addressing the "unique situation" presented by this case, *id.* at 88a, the court concluded that the government had overcome the *Remmer* presumption of prejudice because there was "no indication that the media outlets attempted to influence the juror in any way," that the outlets "were motivated to influence the outcome of the case," or that Wilson "informed the other members of the jury about the phone calls." *Id.* at 89a.

The court rejected petitioner's contention that "juror misconduct represents structural error which always requires reversal" even if there was no "determinable influence on the jury." Pet. App. 90a-91a. The court reasoned that, "under established precedent," a juror's violation of the court's instructions "is not subject to structural error analysis" but instead may be reviewed for harmlessness. *Id.* at 91a.

In addition, the court observed that petitioner had abandoned any claim that the jurors prematurely deliberated about the case. Pet. App. 79a n.5. The court noted, however, that "[h]ad the issue been presented, the court would have determined, after having heard sworn testimony from all sixteen jurors, that there had been no premature deliberations." *Ibid.*

b. In a separate opinion, the district court held Wilson in contempt of court for violating instructions not to

discuss the case outside of deliberations. Pet. App. 93a-106a. The court specifically declined to hold Wilson in contempt on the ground that she had not been completely forthcoming in her testimony about her phone calls to the media. Instead, the court gave Wilson "the benefit of the doubt" on that score, crediting her assertion that she had forgotten certain events during her testimony. *Id.* at 101a-102a. The court ordered Wilson to return $2500 of her jury service fee and to perform 120 hours of community service. *Id.* at 104a-105a.

5. The court of appeals affirmed. Pet. App. 1a-72a. The court first rejected petitioner's argument that egregious juror misconduct constitutes structural error that cannot be reviewed for harmlessness. *Id.* at 27a n.8. Like the district court, the court of appeals instead analyzed petitioner's claim under the *Remmer* framework, noting that the government had conceded that Wilson's outside communications triggered *Remmer's* "presumption of prejudice." *Id.* at 27a. The sole question, the court reasoned, was "whether 'there exists no 'reasonable possibility that the jury's verdict was influenced by an improper communication.'" *Ibid.* The court noted that a "variety of factors" inform that inquiry, "including the extent of the improper communication, the extent to which the communication was discussed and considered by the jury, the type of information communicated, the timing of the exposure, and the strength of the Government's case." *Id.* at 27a-28a.

Applying those factors, the court concluded that the government had carried its burden of proving that petitioner had not been prejudiced by the outside contacts. The court reasoned that Wilson's conversations with the media were "minimal," lasting at most six minutes, and there was no indication "that the media outlets even pro-

vided any information to Wilson." Pet. App. 28a. The court also explained that, to the extent Wilson was told that one reporter had previously covered petitioner's escape from prison, that information was "obviously cumulative of what the jury had already heard." *Id.* at 29a. In addition, the court noted the district court's finding that Wilson did not inform the other jurors about the phone calls. *Ibid.*

The court acknowledged that the timing of the calls was "troubling" because they occurred just before deliberations began. But the court concluded that the district court did not abuse its discretion in denying petitioner's new trial motion given its finding that "Wilson received no substantive information during these phone calls." Pet. App. 29a.

In a footnote, the court rejected petitioner's related claim that the district court erred by not conducting additional proceedings about Wilson's 71 phone calls to two other jurors. The court reasoned that a district court has broad discretion in investigating juror misconduct claims. No further inquiry was necessary, the court explained, because the district court had already decided, after extensive hearings, that Wilson had received no information from the news outlets and had not informed the other jurors about her outside contacts. Pet. App. 29a & n.9.

ARGUMENT

1. Petitioner asserts (Pet. 14-23) that the evidence elicited in the district court demonstrates that Wilson was actually biased. On that basis, he contends that Wilson's presence on the jury constituted structural error, requiring reversal of his death sentence without regard to any showing of prejudice. The court of appeals cor-

rectly rejected that contention, and its decision does not merit this Court's review. Petitioner's suggestion that Wilson lacked impartiality does not implicate any disagreement about the applicable law, which is well settled, but instead amount to a challenge to the district court's factual findings. The testimony on which petitioner primarily relies for his assertions about Wilson's alleged bias, moreover, was elicited in violation of the restrictions in Fed. R. Evid. 606(b) on post-verdict inquiry into internal juror misconduct. Because petitioner's claim is based on a factually erroneous and legally flawed predicate, this Court should deny review.

a. The law governing petitioner's contention concerning Wilson's alleged bias is well established. Under longstanding precedent of this Court, "[t]he constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors." *Murphy* v. *Florida*, 421 U.S. 794, 799 (1975) (internal quotation marks and citation omitted); see *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it."). Because the effects of actual bias on a factfinder cannot be ascertained, the presence of an actually biased juror is a structural error that requires automatic reversal. See, *e.g.*, *Gomez* v. *United States*, 490 U.S. 858, 876 (1989 ("Among those basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury.") (internal quotation marks and citations omitted); *Rivera* v. *Illinois*, 129 S. Ct. 1446, 1455-1456 (2009).

The courts of appeals agree about those general principles. Contrary to petitioner's contention (Pet. 21-23), neither the Fourth Circuit in *Sherman* v. *Smith*, 89 F.3d 1134 (1996), cert. denied, 519 U.S. 1091 (1997), nor

the First Circuit in *United States* v. *Tejada*, 481 F.3d 44, cert. denied, 552 U.S. 1021 (2007), applied harmless-error review to verdicts announced by juries that included an actually biased individual. Instead, those cases addressed "*claims* of juror * * * bias" allegedly caused by exposure to potentially prejudicial information. *Sherman*, 89 F.3d 1139 (emphasis added). In order to determine whether the claim was valid—that is, whether the outside contact undermined the juror's impartiality—those courts evaluated the degree of prejudice resulting from the improper influence on the jury. See *ibid.*; *Tejada*, 481 F.3d at 50-52. But the premise of that inquiry is that, if the exposure had in fact been sufficient to cause actual bias in any juror, reversal would be constitutionally compelled.

b. Petitioner's assertion that Wilson was actually biased turns on the particular facts of this case and presents no legal question of broader significance. The factual premises of petitioner's argument, moreover, contradict the findings the district court reached after considering hours of live testimony over the course of nine evidentiary hearings.

Petitioner's claim of actual bias rests primarily on the assertions that Wilson's motive in calling the news outlets was to achieve "stardom," thereby creating a "personal interest in the outcome of the case" (Pet. 15-16); that Wilson displayed her "bias, personal interest, and zeal" for a death sentence by committing perjury during the post-trial hearings (Pet. 16); and that Wilson told other jurors that she had made up her mind to impose the death penalty before deliberations began (Pet. 16).

Those assertions are inconsistent with the district court's factual findings. Rather than concluding that

petitioner contacted reporters in order to "bask in the media spotlight" (Pet. 15), the district court found a "degree of credence" in Wilson's explanation that her motive was to inform the public about safety risks. Pet. App. 78a n.3. The court specifically noted in that connection that Wilson did not call the media again after the jury returned its verdict. *Ibid.* Petitioner emphasizes (Pet. 11) the district court's remark to counsel at the November 18, 2004, hearing that he believed Wilson wanted "her 15 minutes of fame" (C.A. App. 2982), but the court made that comment before Wilson testified on November 23, 2004, that her true motivation was concern for public safety (*id.* at 3026-3027). The district court implicitly repudiated that earlier, preliminary remark in its written opinion. See Pet. App. 78a n.3 (noting, but not accepting, "[d]efense counsel['s] suggest[ion] that Wilson's motive was more ulterior, contending that she desired her '15 minutes of fame'").

Similarly, the district court did not find that petitioner committed perjury in the post-verdict hearings. Although the district court found discrepancies between the testimony of Mays and Wilson, it expressly concluded that "none of [them was] significant," Pet. App. 79a n.4, and the court accepted Wilson's testimony that her faulty memory explained her initial failure to disclose all of her calls to the news outlets. *Id.* at 102a.[3]

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[3] Petitioner's argument (Pet. 16) that the district court found that Wilson committed perjury is based on the district court's comment to counsel at the November 23, 2004, hearing that "[i]f I determine she committed perjury, which I essentially have when I say I accepted * * * [Mays'] version of what happened, what further interest do you have in what happens to her on a punishment end?" C.A. App. 3069-3070. That casual remark was made before the district court had heard all of Wilson's testimony. See *id.* at 3148-3158. The district court's

The district court also correctly concluded, contrary to petitioner's assertions, that the jury did not engage in premature deliberations. See Pet. App. 79a n.5. Juror Richardson's testimony does not support petitioner's assertion that Wilson had made up her mind about the death penalty before deliberations began. Richardson testified that Wilson was an "either[/] or" person who, in Richardson's opinion, had "basically already had her mind made up to a certain degree." C.A. App. 2970. But Richardson further testified that she did not remember whether Wilson said "anything in general in reference to how she did or didn't feel about the death penalty," and Richardson specifically denied that Wilson had asked Richardson about her views on the death penalty before deliberations. *Id.* at 2970-2971.[4]

c. Review of petitioner's factbound challenge to the district court's findings is also inappropriate for a separate reason: the testimony on which petitioner relies was elicited in violation of the Federal Rules of Evidence and therefore could not properly be considered by this Court.

"[T]he near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict."

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opinion denying petitioner's motion for a new trial and its contempt order represent the final word on Wilson's credibility, and neither supports petitioner's contention that Wilson committed perjury.

[4] Wilson's statement to Mays that some of the jurors were "for" the death penalty but "others * * * were not" (C.A. App. 2853) did not establish that the jurors had deliberated prematurely. At most, it establishes Wilson's impression. Notably, petitioner "dropped[] the issue of premature deliberations," Pet. App. 79a n.5, and cannot resurrect it now in the fact of the district court's contrary finding "after having heard sworn testimony from all sixteen jurors." *Ibid.*

Tanner v. *United States*, 483 U.S. 107, 117 (1987). The "no impeachment" rule advances several important interests. Allowing juror testimony to impeach a verdict would promote harassment of jurors, chill frankness and freedom of discussion in the jury room, deter jurors from returning unpopular verdicts, undermine the community's trust in a system that relies on the decisions of lay people, and disrupt the finality of verdicts. *Id.* at 120-121. Those policies are reflected in Federal Rule of Evidence 606(b), which authorizes a district court to conduct a post-verdict inquiry into whether the jury was improperly exposed to "extraneous prejudicial information" or to an "outside influence," but prohibits a juror from "testify[ing] * * * to the effect of anything upon * * * [a] juror's mind or emotions as influencing the juror to assent to or dissent from the verdict * * * or concerning the juror's mental processes in connection therewith."

Thus, under Rule 606(b), a district court may not conduct a post-verdict inquiry into a juror's mental processes, including his attitude toward the parties or the case, see, *e.g.*, *United States* v. *Gonzales*, 227 F.3d 520, 525-526 (6th Cir. 2000); *United States* v. *Chiantese*, 582 F.2d 974, 978 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979); whether a juror was pressured or coerced by other jurors, see, *e.g.*, *United States* v. *Decoud*, 456 F.3d 996, 1019 n.11 (9th Cir. 2006), cert. denied, 551 U.S. 1116 (2007); *United States* v. *Briggs*, 291 F.3d 958, 961-962, 963-964 (7th Cir.), cert. denied, 537 U.S. 985 (2002); or whether the jury deliberated prematurely. See, *e.g.*, *United States* v. *Logan*, 250 F.3d 350, 378-381 (6th Cir.), cert. denied, 534 U.S. 895 (2001); *United States* v. *Cuthel*, 903 F.2d 1381, 1382-1383 (11th Cir. 1990).

If a district court that is conducting a post-verdict investigation on an outside-influence claim improperly admits evidence of an internal matter, such as a juror's state of mind about the case or whether and to what extent the jury engaged in premature deliberations, the court of appeals must confine its review to the outside influence matter and disregard the improperly admitted evidence about the internal matters. See, *e.g.*, *United States* v. *Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001), *United States* v. *Cheek*, 94 F.3d 136, 143-144 (4th Cir. 1996); *United States* v. *Blumeyer*, 62 F.3d 1013, 1014-1015 & n.1 (8th Cir. 1995), cert. denied, 516 U.S. 1172 (1996).

Here, the district court properly conducted a post-verdict inquiry into Wilson's calls to the news outlets, but it violated Rule 606(b) by eliciting evidence about both Wilson's state of mind concerning the case and whether the jurors had discussed the case among themselves during the trial. In particular, the district court improperly admitted the testimony of Mays, Richardson, Robertson, and Wilson about the jury's internal communications and deliberations, as well as Wilson's husband's testimony about Wilson's state of mind after she was selected as a juror. Accordingly, on appeal, the court of appeals was required to disregard the portion of petitioner's jury misconduct claim that was based on the improperly admitted internal-misconduct evidence and confine its review to petitioner's outside-influence claim. Although the court of appeals did not explicitly address this contention, which the government advanced below, see Gov't C.A. Br. 52-55, the court did properly limit its review to petitioner's external-influence claim and sum-

marily rejected petitioner's "structural error" claim based on the improperly admitted evidence.[5]

This Court's review would similarly be confined to the evidence about external contacts involving Wilson and would not encompass testimony about any jurors' state of mind or the interactions among the jurors. This case therefore does not squarely present even the factbound question whether a particular juror was actually biased or whether the jurors engaged in premature deliberations.[6]

2. Petitioner contends (Pet. 23-29) that the court of appeals erred in upholding the district court's determination that the government rebutted the "presumption

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[5] Petitioner cites no authority for the proposition that a reviewing court that is evaluating an outside-influence claim may also rely on evidence of internal jury matters improperly admitted under Rule 606(b). This Court's decisions in *Turner* v. *Louisiana*, 379 U.S. 466 (1965), *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), *Irvin* v. *Dowd*, 366 U.S. 717 (1961), are inapposite. *Turner* involved external contacts with law enforcement officers who testified for the prosecution and who were also in charge of the jury during the trial. *Irvin* and *Rideau* were pretrial prejudicial publicity cases, and neither concerned a juror bias claim based in part on evidence obtained in violation of Rule 606(b).

[6] In *Wellons* v. *Hall*, 130 S. Ct. 727 (2010) (per curiam), a capital case, this Court granted the petition, vacated the judgment, and remanded the case to the court of appeals for further consideration of the defendant's claim that he was denied discovery or an evidentiary hearing on his assertion that the jury had engaged in misconduct at his trial. In this case, in contrast, the district court has already conducted a full evidentiary inquiry on all material aspects of the juror-misconduct issue. C.A. App. 2851-3155. And the Court's decision did not disturb the evidentiary limits established by Rule 606. Indeed, on remand, the Eleventh Circuit directed the district court to grant discovery and conduct an evidentiary hearing "in keeping with its analysis of" *Tanner*. *Wellons* v. *Hall*, — F.3d —, 2010 WL 1531174 *1 (11th Cir. April 19, 2010).

of prejudice" arising from Wilson's calls to the news media. He argues that certiorari is warranted to resolve disagreements in the court of appeals about whether the framework in *Remmer* v. *United States*, 347 U.S. 227 (1954), has been invalidated by subsequent decisions, as well as what showing the government must make to prevail under that framework. The courts of appeals have adopted varying approaches to the *Remmer* inquiry, but this case does not implicate any such disagreements. Both courts below applied the *Remmer* presumption, and both held the government to a particularly stringent standard for rebutting that presumption. Petitioner therefore has already received full consideration of his claims under the view of the law that is more favorable to him. The court of appeals correctly concluded that the district court's application of *Remmer* was not an abuse of discretion, and there is no reason for this Court to review that factbound determination.

a. In *Remmer*, *supra*, a defendant who had been convicted on criminal charges sought a new trial after learning that, during trial, a third party had attempted to bribe a juror and the district court had initiated an FBI inquiry into the matter. This Court did not hold that a new trial was automatically required because of that improper contact. Instead, the Court remanded the case to the district court "with directions to hold a hearing to determine whether the incident complained of was harmful to the [defendant]." 347 U.S. at 230. In so holding, the Court observed that, "[i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Id.* at 229. The Court added that the presumption, although "not conclusive," places

the burden on the government "to establish * * * that such contact with the juror was harmless to the defendant." *Ibid.*

More recently, this Court has declined to apply a presumption of prejudice to other claims of jury irregularities. In *Phillips*, the Court held that the proper remedy in a case in which a juror had applied for a position in the prosecutor's office during trial was "a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215; see *id.* at 217 ("due process does not require a new trial every time a juror has been placed in a potentially compromising situation"). In refusing to presume prejudice, the Court explained that "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Ibid.*

Likewise, in *United States* v. *Olano*, 507 U.S. 725 (1993), the Court declined to apply any presumption of prejudice when alternate jurors were present during jury deliberations. *Id.* at 737-740. The Court held that no new trial was required in light of a post-verdict inquiry that showed that the alternate jurors did not participate in the deliberations. *Id.* at 739-741. The Court noted that a "presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" *Id.* at 739.

b. The courts of appeals have adopted divergent positions on whether and to what extent *Remmer*'s presumption of prejudice survives *Phillips* and *Olano*. The Sixth Circuit has held that the presumption does not exist and that the defendant has the burden of showing actual bias by the juror. See, *e.g.*, *United States* v. *Orlando*, 281 F.3d 586, 596-597 (6th Cir.), cert. denied, 537

U.S. 947 (2002). Other courts of appeals tend to apply the presumption only to certain forms of improper contact and employ varying articulations of the circumstances that trigger the *Remmer* inquiry. See *United States* v. *Honken*, 541 F.3d 1146, 1167 (8th Cir. 2008) (*Remmer* presumption applies only when "the alleged outside contact relates to factual evidence not developed at trial"), cert. denied, 130 S. Ct. 1011 (2009); *United States* v. *Gallardo*, 497 F.3d 727, 735-736 (7th Cir. 2007) (declining to apply *Remmer* presumption where misconduct was not as serious as in *Remmer* itself), cert. denied, 129 S. Ct. 288 (2008); *United States* v. *Barrett*, 496 F.3d 1079, 1102 (10th Cir. 2007) (*Remmer* applies when the contact was "about the matter pending before the jury") (citation omitted), cert. denied, 128 S. Ct. 1646 (2008); *United States* v. *Smith*, 354 F.3d 390, 395 (5th Cir. 2003) (holding that there must be "some evidence of a prejudicial effect before burdening the government with a requirement that it prove the intrusion harmless"), cert. denied, 541 U.S. 953 (2004); *Lloyd*, 269 F.3d at 238 (*Remmer* applies to outside contacts of a "considerably serious nature"); *United States* v. *Boylan*, 898 F.2d 230, 261 (1st Cir.) ("significant" contact or "aggravated circumstances"), cert. denied, 498 U.S. 849 (1990); *United States* v. *Dutkel*, 192 F.3d 893, 895 (9th Cir. 1999) (noting that *Remmer* announced a "special rule" for jury tampering). Other circuits have reserved the issue. *United States* v. *Ronda*, 455 F.3d 1273, 1299 & n.36 (11th Cir. 2006), cert. denied, 549 U.S. 1212 (2007); *United States* v. *Gartmon*, 146 F.3d 1015, 1027-1028 (D.C. Cir. 1998).

c. This case does not present the questions of whether and when the *Remmer* presumption applies, because both courts below concluded that the presump-

tion applied in this case. Nor can petitioner contend that he would have fared better under an alternative articulation of the *Remmer* framework. Both courts below reasoned that the government could rebut the presumption only by showing that there exists "no reasonable possibility that the jury's verdict was influenced by an improper communication." Pet. App. 27a (quoting *United States* v. *Cheek*, 94 F.3d 136, 141 (4th Cir. 1996); *id.* at 87a. Petitioner has not identified any court that imposes on the government a more demanding showing. Because resolving any conflict among the courts of appeals concerning *Remmer* therefore would not benefit petitioner, this case would not be an appropriate vehicle for consideration of that issue.

d. There is no reason for this Court to review the decision below upholding the district court's application of the *Remmer* framework to the particular facts. To determine whether the government has rebutted the "presumption of prejudice," courts consider many factors, including the nature of the contact, the timing of the juror's exposure to the information, and the strength of the government's case. See *Ronda*, 455 F.3d at 1299-1300; *Lloyd*, 269 F.3d at 240-241; *United States* v. *Williams-Davis*, 90 F.3d 490, 497, 501-502 (D.C. Cir. 1996), cert. denied, 519 U.S. 1128 (1997). Those factors apply even if it was the juror, rather than the third party, who initiated the improper contact. See, *e.g.*, *Barrett*, 496 F.3d at 1101-1102; *United States* v. *Sampson*, 486 F.3d 13, 41-42 (1st Cir. 2007), cert. denied, 128 S. Ct. 2424 (2008); *Blumeyer*, 62 F.3d at 1017-1018. Cf. *Phillips*, 455 U.S. at 212 (juror submitted application to prosecutor's officer while sitting on the jury). Courts have concluded that the government rebutted the presumption when the juror was not exposed

to any prejudicial information or the encounter was otherwise innocuous. See, *e.g.*, *Barrett*, 496 F.3d at 1102; *Sampson*, 486 F.3d at 41-42; *Ronda*, 455 F.3d at 1300; *Boylan*, 898 F.2d at 261-262.

In this case, both courts below concluded that the government rebutted the presumption of prejudice because Wilson did not learn any substantive non-cumulative information about the case from her conversations with media personnel.[7] The content of Wilson's conversations with the media representatives and the impact of those conversations on her impartiality are questions of fact, see *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983); *Thompson* v. *Keohane*, 516 U.S. 99, 111 (1995), and this Court ordinarily does not review facts concurred in by two courts below. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987). Indeed, the prejudice inquiry is similar to harmless error review generally, a task that is usually left to the courts of appeals. See, *e.g.*, *Pope* v. *Illinois*, 481 U.S. 497, 504 (1987) (noting that this Court undertakes harmless error review only "sparingly"). Thus, review of the court of appeals' fact-bound holding that the government rebutted the presumption of prejudice is unwarranted.

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[7] Petitioner cites (Pet. 23-25) several cases for the proposition that transmission to the juror of "substantive information" is not invariably necessary for a finding of prejudice under *Remmer*. The courts below did not hold to the contrary. They addressed the "unique situation" presented by this case, in which a juror initiates contact with the news media but there is no claim that any third party sought to intimidate or tamper with the jury. Pet. App. 88a. The courts focused on the transfer of "substantive information" to the juror not because that is the only kind of prejudice cognizable under *Remmer*, but instead because that is the kind of potential prejudice created by this particular set of circumstances.

3. Petitioner contends (Pet. 29-33) that, in conflict with *Remmer*, the court of appeals failed to examine the "entire picture" of potential prejudice because it upheld the district court's refusal to conduct further proceedings concerning Wilson's 71 pre-deliberation telephone calls to two other jurors. That contention is incorrect and does not merit further review.

A district court has wide discretion in the amount of investigation that it must undertake when confronted with a claim of jury misconduct. The extent of the inquiry depends on the likelihood that the outside communication contaminated the jury. In some circumstances, a comprehensive inquiry is required, while in others only a limited inquiry is warranted. See *Wisehart* v. *Davis*, 408 F.3d 321, 326 (7th Cir. 2005) (Posner, J.), cert. denied, 547 U.S. 1050 (2006); *Smith*, 354 F.3d at 394.[8]

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[8] Petitioner errs (Pet. 32-33) in contending that the courts of appeals disagree about the amount of investigation that is required in response to a claim of jury misconduct. The courts of appeals recognize that the extent of the investigation depends on the particular facts of the case. Petitioner's reliance on *United States* v. *Vasquez-Ruiz*, 502 F.3d 700 (7th Cir. 2007), and *United States* v. *Resko*, 3 F.3d 684 (3d Cir. 1993), is misplaced. Both cases involved claims of improper contact that were raised during the trial. Accordingly, unlike in this case, Rule 606(b) did not pose any obstacle to investigation of internal jury communications. Both cases also involved less extensive inquiry than the district court conducted here. In *Vasquez-Ruiz*, the district court failed to voir dire the jurors to determine whether any one of them had written the word "guilty" in another juror's notebook, resulting in what the court of appeals considered a "lack of information in this record about the source of the notation." 502 F.3d at 707. Similarly, in *Resko*, the court of appeals concluded that the district court did not conduct a proper investigation into premature deliberations when it refused to voir dire the jurors individually, but instead relied on a questionnaire in which each juror admitted that he had discussed the case with other jurors but had not formed an opinion about the case. Here, in marked contrast, by the

In response to petitioner's claim of jury misconduct, the district court

> held nine hearings on the matter and heard, under oath, from all jurors (regular and alternates) individually, Ms. Wilson (on three different occasions), her husband and two members of the news media. The court * * * heard from a total of nineteen witnesses, authorized the subpoena of hundreds of records of phone calls from as many as three phones and facilitated the cooperation of five media outlets.

Pet. App. 82a. That investigation, which the court of appeals described as "a 'textbook model,'" *id.* at 30a, went "far beyond what is required in this situation," *id.* at 82a. By the time petitioner made the motion for further inquiry into the 71 phone calls, the district court had already heard testimony from every juror—including the two who had participated in the calls—each of whom testified that he or she had not been exposed to any substantive outside information. The district court did not err in crediting that testimony, and it acted well within its discretion in concluding that no further inquiry was necessary. Indeed, any additional investigation would have risked further violation of Rule 606(b). The court of appeals' decision upholding the manner in which the district court conducted the post-hearing inquiry therefore does not merit this Court's consideration.

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time petitioner moved for additional hearings, the district court had already determined that no juror was exposed to any prejudicial outside information after holding lengthy hearings on the issue. In these circumstances, the district court did not abuse its discretion in concluding that no further investigation was warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

BRANDON LEON BASHAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF

The Government dismisses the petition as a fact-bound challenge unworthy of the Court's attention. But this case does not turn on disputed facts or contested factual findings. All parties concede that Cynthia Wilson, the jury foreperson in this federal death penalty case, engaged in extreme misconduct: in violation of 41 direct orders from the District Court, she called five media outlets during trial to drum up publicity about the case; in one call to a television station, she expressed "concern" and "fear" that her fellow jurors would not impose the death penalty, and requested an "on camera interview" after the trial; she made 71 phone calls during trial to two fellow jurors, totaling nearly 18 hours, with many clustered around her calls to the press; and she was held in contempt by the District Court. This case turns on the legal significance of these and other undisputed facts and upon clear disputes among circuit courts regarding how to analyze claims of juror bias and claims of juror extrajudicial contacts.

First, this case presents an important issue because Wilson's unprecedented misconduct proved actual bias – in that she demonstrated a personal interest in the outcome and had decided the case before the trial was concluded – and thus constituted a "structural error" requiring reversal without a showing of prejudice. Although the Fourth Circuit recognized that Petitioner made this claim, it dismissed it in a footnote, erroneously stating it was subject to harmless-error analysis, Pet. App. 27a n.8,

and concluding that no "prejudice" resulted from the juror's extrajudicial contacts, Pet. App. 28a-29a. But Petitioner's claim of juror bias and structural error, while drawing support in part from Wilson's media calls, is distinct from Petitioner's extrajudicial-contacts claim and requires a new trial. There are no factual disputes regarding this issue. The proper treatment of claims of juror bias, as evidenced by Wilson's conduct in this case, is worthy of review.

Second, as the Government concedes, the circuit courts are split on the proper treatment of extrajudicial-contacts claims. The Government argues that this case is not an appropriate vehicle to consider those divisions because the Fourth Circuit claimed to apply the presumption of prejudice articulated in *Remmer v. United States*, 347 U.S. 227 (1954). But while it played lip service to the concept, the Fourth Circuit did not in fact extend Petitioner the benefit of the presumption. Although much about Wilson's numerous calls remained unknown, the court faulted Petitioner for a failure of proof. It also applied an unduly narrow concept of "prejudice." Whether the *Remmer* presumption still exists, and if so what it means, is in dispute among the circuits, critical to this case, and worthy of review.

Third, the courts below truncated the inquiry into potential prejudice well short of the standard established in *Remmer v. United States*, 350 U.S. 377 (1956) ("*Remmer II*"). In so doing, they ensured that the content of Wilson's 71 phone calls with fellow jurors during trial remained unknown, and

denied Petitioner a chance to meet the burden that had been wrongly imposed on him in the first place.

As this Court recently held, "[f]rom beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect." *Wellons v. Hall*, 130 S. Ct. 727, 728 (2010) (per curiam). The proceedings below did not meet this standard, and present Sixth Amendment issues that have divided the circuit courts. The Court's review is warranted.

ARGUMENT

1. On the first question, the Government agrees that, under this Court's precedents, "the presence of an actually biased juror is a structural error that requires automatic reversal." Opp. at 16. But both the Fourth Circuit (in this and other cases) and the First Circuit have stated that claims of juror bias are subject to harmless-error analysis. *See* Pet. App. 27a n.8; *Sherman v. Smith*, 89 F.3d 1134, 1139-40 (4th Cir. 1996) (en banc); *United States v. Tejeda*, 481 F.3d 44, 50 (1st Cir. 2007). In the Government's view, this approach conforms with this Court's and other circuits' cases because it uses harmless-error analysis to "evaluate[] the degree of prejudice resulting from the improper influence" on the juror. Opp. at 17. If that inquiry reveals actual bias, then "reversal would be constitutionally compelled." *Id.*

But the Government's reconstruction is not a fair reading of these cases. Here, the Fourth Circuit flatly ruled that juror bias is *not* structural error and, instead, is subject to "harmless error analysis"

and a consideration of prejudice. Pet. App. 27a n.8 (quotation marks omitted); *see also Tejeda*, 481 F.3d at 50. Under the Fourth Circuit's view as expressed in *Sherman*, a court must conclude that juror bias or misconduct "had substantial and injurious effect or influence in determining the jury's verdict" before granting relief. *Sherman*, 89 F.3d at 1140. Under that view, a court could conclude that a juror was actually biased, but deny relief nonetheless. *See id.* at 1142-43. Citing *Sherman*, the decision below did not even consider whether Wilson's conduct and statements proved actual bias, but instead focused on prejudice.[1] That approach is incompatible with this Court's and other circuits' cases about the treatment of actual-bias claims. *See* Pet. at 14-23.

If the courts below had considered Petitioner's actual-bias claim, the evidence was dispositive. Contrary to the Government's assertion, *see* Opp. at 17-19, Petitioner's claim is based on undisputed facts, including:

- When initially selected as a juror, Wilson told her husband, Gregory Wilson, that she was "excited" and that jury service could be a "big opportunity" for her. *See* Pet. at 9.

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[1] The facts that demonstrate Wilson's bias and prejudgment are at least as troubling as those at issue in *Wellons*, 130 S. Ct. 728-29, and the Fourth Circuit's treatment of Petitioner's structural-error arguments was just as perfunctory as the Eleventh Circuit's consideration of Wellons' juror misconduct claims. In this case, the Court could take the same approach as in *Wellons*, remanding the case for full consideration of Petitioner's structural-error claims. *Id.*

- In violation of 41 direct court orders, Wilson called five local media outlets during the penalty phase. *See id.* at 10. In one call, Wilson told Shannon Mays, a television producer, that the trial would make "good TV" because Petitioner had been "acting up"; expressed her "fear" and "concern" that other jurors would not recommend a death sentence; and requested an on-camera interview following the trial. *See id.* at 7-8.
- Wilson discussed the case with fellow jurors before the conclusion of the penalty phase and, in the mind of at least one juror, Shelda Richardson, "had basically already had her mind made up to a certain degree" about a death verdict. *See id.* at 9.
- Wilson knew that Richardson had doubts about imposing the death penalty, and, in Richardson's words, would "feed [her] information to feel . . . which way [she was] leaning." *See id.* The probing made Richardson so uncomfortable that she reminded Wilson that the jury had to "hear all the evidence in the case" before deciding on a verdict. *See id.*
- During the guilt and penalty phases, Wilson made 71 phone calls to two other jurors in the case, totaling nearly 18 hours. Many of the lengthier calls were clustered around when Wilson called the five media outlets. *See id.* at 10.
- When confronted post-trial with evidence of her phone calls to three of the five media outlets, Wilson did not mention her calls to the other

two, nor did she mention her 71 calls to fellow jurors. *See id.* at 8. She also failed to acknowledge most of the critical statements attributed to her by Mays. *Id.* at 9. The district court credited Mays' account over Wilson's. *Id.*

These facts show that Wilson was not a disinterested juror who decided Basham's fate solely on the evidence and instructions. Rather, she sought to generate publicity about the case, had thoughts of her own on-camera opportunities, and made clear through her statements to Mays and other jurors that she had decided to impose the death penalty before hearing closing arguments or the court's instructions. These facts compel a finding of bias under this Court's precedents, *see id.* at 18-19, or at least warrant review.

Contrary to the Government's claim, these facts are based on testimony that was admitted in compliance with Federal Rule of Evidence 606(b). The Rule prohibits juror testimony on "(1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberation, and (4) the testifying juror's own mental process during the deliberations." *United States v. Ruggiero*, 56 F.3d 647, 652 (5th Cir. 1995). Thus, Mays and Gregory Wilson were free to testify because they were nonjurors. *See Tanner v. United States*, 483 U.S. 107, 127 (1987). Richardson's testimony was admissible because it concerned Wilson's pre-deliberation conduct and statements, and did not

discuss the "effect" that conduct or those statements had "upon an outcome in the deliberations." *See United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001) (holding that juror testimony regarding the statements of another juror was admissible in part because the statements were made "*before* deliberations began"). And Wilson's testimony was admissible because she simply addressed the content of her phone calls to the media and her rationale for making those calls – issues that had nothing to do with the jury's deliberations and that were crucial to the court's permissible investigation into "whether extraneous prejudicial information was improperly brought to the jury's attention." Fed. R. Evid. 606(b).

2. On the second question, the Government acknowledges the divides among the circuits about the vitality and import of *Remmer v. United States*, 347 U.S. 227 (1954), but claims they are not implicated here. That is wrong, for several reasons.

The Government first argues that, because the District Court and the Fourth Circuit nominally applied the *Remmer* presumption, this case does not present the underlying question whether *Remmer* remains good law – a question about which the Government concedes the lower courts are openly divided. Opp. at 24-25. The application and import of *Remmer* are central to this case, however. If Basham ultimately prevails in this Court on *Remmer* grounds, this Court necessarily would affirm the majority-circuit rule that *Remmer* was not *sub*

silentio overruled, and reject the contrary minority view. *See* Pet. at 25-27.[2]

The Government next claims that Petitioner cannot "contend that he would have fared better under an alternative articulation of the *Remmer* framework." Opp. at 26. But it is the Fourth Circuit's failure to *apply* the presumption it articulated that squarely presents the *Remmer* issue in this case. *See Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996). The Fourth Circuit *reasoned* that Basham was entitled to no relief because, despite significant evidentiary gaps resulting from purported failures of recollection by Wilson and her media contacts, *see* Pet. at 10, Petitioner did not prove that the foreperson received "substantive information." Pet. at 24; Opp. at 27.

That erroneous holding implicates two related divides among the lower courts. The first concerns what the *Remmer* presumption *is*. Is it, as Seventh Circuit Judges Wood and Posner concluded, a rule under which the Government "bears the risk of uncertainty in this situation"? *United States v. Vasquez-Ruiz*, 502 F.3d 700, 705 (7th Cir. 2007) ("We read *Remmer* as holding that it is the prosecution."). Or does *Remmer* require, as the Fourth Circuit reasoned here, a defendant to *prove* that the transmission of prejudicial "substantive information" occurred? The Seventh Circuit's reading is correct

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[2] The Government argued below that *Remmer* had been overruled by subsequent cases and that Basham could only prevail by proving actual prejudice. *See* Pet. App. 84a-85a; Gov't 4th Cir. Br. at 45.

under this Court's decision in *Remmer II*. Had the Fourth Circuit adopted that approach, Petitioner would have been entitled to a new trial in light of the substantial uncertainty remaining in the record. Pet. at 27-28.

The second divide concerns whether the *Remmer* presumption can be rebutted simply with a showing that the juror did not receive any "substantive information" about the case. This Court's cases firmly say it cannot: neither *Remmer* itself, nor its successor *Gold v. United States*, 352 U.S. 985 (1957), involved transmittal of substantive information. *See* Pet. at 28-29. Many circuits, including the Seventh, have adopted that view as well. *Id.*

Indeed, it would be illogical to limit "prejudice" to the receipt of "substantive information" as the Fourth Circuit did here. A juror's external contacts, particularly with the press, can involve several other kinds of prejudice, including the creation of a personal interest, the suggestion of an outcome, or the injection of hostile community sentiment. Each such influence would be highly improper. And where, as here, the record shows that the jury foreperson had *five* conversations with the press during trial, lasting as long as *six and four minutes*, under *Remmer* it is the Government that must overcome the presumption that those kinds of influences may have occurred. *See Remmer*, 347 U.S. at 229; *cf. Irvin v. Dowd*, 366 U.S. 717, 729-30 (1961) (Frankfurter, J., concurring). That conclusion is not possible on this record. *See* Pet. at 7-10.

The Government does not attempt to dispel the clear lower-court divide on this issue. It concedes the Eighth Circuit takes essentially the view the Fourth Circuit took here, asking whether "factual evidence not developed at trial" was brought to the jury's attention. Opp. at 25 (quotation marks omitted). That narrow approach has no basis in this Court's precedents.

Further, the principle that this Court reviews harmlessness issues "sparingly," Opp. at 27, is inapplicable here. Unlike many assessments of "harmless error" or "prejudice," little is settled in the lower courts' application of *Remmer*. Opp. at 24-25; Pet. at 23-33. The Court often clarifies the law – even the law of harmless error or prejudice – in such circumstances. *See Shinseki v. Sanders*, 129 S. Ct. 1696, 1700 (2009); *Fry v. Pliler*, 551 U.S. 112 (2007).

3. On the third question, the Government defends the District Court's decision to curtail investigation into Wilson's 71 phone calls with fellow jurors by invoking the court's discretion. *See* Opp. at 28. But the Fourth Circuit's affirmance of that decision conflicts with this Court's unanimous opinion in *Remmer II*, the controlling case on this question. Pet. at 38-39. The Government does not so much as cite – let alone distinguish – that case, which holds that district courts *must* examine the "entire picture," or "all the . . . facts and circumstances," of extrajudicial contacts. 350 U.S. at 379, 382.

Even if the District Court could exercise discretion in these circumstances, limiting

investigation out of a fear of revealing romantic relationships between jurors, *see* 4th Cir. J.A. 3184, is an abuse of that discretion. This Court's cases do not tolerate foreclosing inquiry into extreme juror misconduct in a capital case on such a speculative basis. *Cf. Wellons*, 130 S. Ct. at 729-30.

The District Court's inquiry was plainly insufficient under *Remmer II*. Notwithstanding the Government's assertions, the two jurors with whom Wilson spoke on the phone *did not testify* as to whether they received any "substantive outside information" from Wilson. Opp. at 29. *See* 4th Cir. JA at 2880-86 (Doby); *id.* at 2889-96 (Hartsoe) (asking only about the identity of the juror who had called the media); Pet. App. 20a-21a (describing testimony of two female jurors from "the upstate").[3] Nor does it matter that the District Court questioned each juror – in *Remmer II*, the Court reversed and remanded even though the District Court heard the testimony of 27 witnesses, including all jurors and alternates.[4] The District Court's failure to inquire

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[3] The Fourth Circuit's decision carefully notes that neither Doby nor Hartsoe "mentioned Wilson bringing any external information to their attention." Pet. App. 21a. Neither was asked.

[4] The decision below states that other jurors did not "*mention*[] Wilson bringing any external information to their attention." Pet. App. 21a (emphasis added). In fact, for the most part, the jurors were asked *nothing* about extrajudicial material. "Most jurors were asked only some form of two questions: (1) "Do you recall any juror discussing the death penalty prior to deliberations?"; and (2) "Are you aware of anybody, including Wilson, discussing the case prematurely?" *See* 4th Cir. JA 2936-71, 2976-77. Jurors Doby and Hartsoe, called only to

into the 18 hours of conversation between Wilson and two other jurors, in the face of considerable uncertainty about Wilson's media calls, is impermissible under *Remmer II*.

The Government fails to distinguish *Vasquez-Ruiz* or *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993). Those decisions, unlike the Fourth Circuit's decision here, are faithful to *Remmer II*. *Vasquez-Ruiz* states that "the burden is on the government to rebut the presumption of prejudice," and that there is "no way that the government can satisfy that burden without developing all the information." 502 F.3d at 705. Judge Becker's opinion in *Resko* stands for the same principle. The district court knew that premature discussions occurred, but did not know their content or extent. *Id.* at 691. On appeal, the Third Circuit reversed, holding that the court should have fully investigated those issues. The court ordered a new trial, rather than more investigation, because questioning jurors long after trial was unlikely to resolve the uncertainty. *Id.* at 694-95. Wilson's eighteen hours of conversation with fellow jurors likewise remain unknown. That Wilson interwove them with improper calls to the media only heightens the potential prejudice, because "extra-jury influences . . . pose a far more serious threat to the defendant's right to be tried by an impartial jury." *Id.* at 707.

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identify who contacted the media, were not asked even these questions.

CONCLUSION

The petition should be granted.

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